129-86

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1107. 718 ~~405~~ 133

DICK E. ARROWSMITH, APPELLANT,

vs.

EDWARD H. GLEASON, AMELIA F. HARMENING, INDIVIDUALLY AND AS ADMINISTRATRIX OF JOHN F. HARMENING, DECEASED, AND LYDIA M. HARMENING ET AL., BY HENRY B. HARRIS, GUARDIAN AD LITEM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 16, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the western division of the northern district of Ohio held at the United States court-rooms, in the city of Toledo, in the district aforesaid, before the Honorable E. S. Hammond, district judge of west. dist. of Tenn., assigned by the circuit judge to sit in the circuit court for N. D. O., and the Honorable Martin Welker, district judge for the district aforesaid, on the ninth day of June, being a day of the June term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and ninth year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk.*

[Seal of the Circuit Court, Northern Dist. of Ohio.]

2 Be it remembered that heretofore, to wit, on the 27th day of October, A. D. 1884, the following bill was filed in the clerk's office of said circuit court in a cause entitled as follows, viz:

DICK E. ARROWSMITH, Pl't'f, *vs.* EDWARD H. GLEASON *et al.*, Def't-.

Which bill is in the words and figures following, to wit:

Bill.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

To the honorable the judges of the said circuit court within and for the district aforesaid:

Dick E. Arrowsmith, of the State of Nevada, and a citizen of the State of Nevada, brings this his bill against Edward H. Gleason, Amelia Harmening, in her own right as well as administratrix of the estate of John Frederick Harmening, deceased; Lydia M. Harmening, William Harmening, Carl H. Harmening, and Fritz Harmening, all of the said northern district of Ohio, western division, and all citizens of the State of Ohio; and thereupon your orator complains and says:

That he is the equitable owner and, but for the claims of the said defendants hereinafter set forth, has a legal estate in fee in and to the following-described lands and tenements, to wit: The whole of section thirty-six (36) in township number four (4) north of

3 range number three (3) east, in the county of Defiance and State of Ohio, containing six hundred and forty acres of land, more or less, excepting therefrom a strip or tract of land one hundred (100) feet in width in the southeast quarter thereof, now used and occupied by the Wabash, St. Louis and Pacific Railway Company as and for its right of way for its railroad through said southeast quarter, which strip so excepted contains about six and twenty-five hundredths acres of land, more or less.

Also all that part of the northeast quarter of the northwest fractional quarter of section one (1) in township three (3) of range three (3) east, lying north of the said railroad, situated in the county of Paulding and State of Ohio, containing seven and $\frac{21}{100}$ acres, more or less.

That he became seized of the same as the sole heir-at-law of John C. Arrowsmith, late of the said county of Defiance, deceased, subject, nevertheless, to the dower estate therein of his mother, Mary Arrowsmith, widow of the said John C. Arrowsmith, of one undivided third part thereof during her natural life, in the year 1869.

Your orator, further complaining, says that on or prior to the fifteenth day of July, A. D. 1869, your orator at that time being an infant, of the tender age of but six years old, the said defendant, Edward H. Gleason, applied to the probate court of said Defiance county, State of Ohio, for the appointment, by order of said court, as guardian of the estate of your orator; and your orator says that at that time he had no lawful guardian of his person other than his natural guardian, the said Mary Arrowsmith, his mother, with whom he resided.

4 That at that time the law of the State of Ohio required as follows: "Before any person shall be appointed guardian of the estate of any minor he shall file in the office of the court having such appointment to make a statement of the whole estate of said minor, and the probable value thereof, and also the probable annual rents of such minor's real estate, and shall verify the same by affidavit, and shall give bond with freehold sureties, payable to the State of Ohio, in double the amount of the personal estate belonging to said minor, and also of the gross amount of rents that will be probably received by the guardian from the real estate of said minor during his or her minority, which bond shall be conditioned for the faithful discharge of the duties of said person as such guardian, and shall be approved by the court making such appointment." (S. & C. Rev. Stats., Ohio, p. 671.)

That thereupon the said Edward H. Gleason applied to one Henry Hardy, a freeholder of said county, to become surety upon his bond for the purpose of being appointed guardian as aforesaid, and that the said Henry Hardy did, in compliance with said request, sign and seal the form of the obligation which is hereinafter set forth, with the express agreement and understanding with the said Gleason that before said obligation *to* be delivered, or the said Hardy should be held or bound thereon, the said Gleason should procure the same to be signed and sealed by another surety, a freeholder of said county, and of equal responsibility with himself, the said Hardy.

5 But your orator says that without in any manner complying with his agreement with said Hardy to procure another surety as aforesaid, and without any surety whatever having signed and sealed said obligation, and without the knowledge of the said Henry Hardy, the said Edward H. Gleason delivered and filed the same in the probate court, where by the law of the State of Ohio the said bond was required to be filed. And your orator says that the said obligation signed and sealed by the said Edward H. Gleason and the said Hardy was in the words and figures following, to wit:

"Know all men by these presents that we, Edward H. Gleason and Henry Hardy, are held and firmly bound unto the State of

Ohio in the sum of five thousand dollars, for the payment of which we hereby jointly and severally bind ourselves. Sealed with our seals and dated this 15th day of July, A. D. 1869.

"The condition of the above obligation is such that whereas the above-bounden Edward H. Gleason has this day been appointed by the probate court of Defiance county, State of Ohio, guardian of the estate of Dick E. Arrowsmith, minor child of John C. Arrowsmith, deceased, late of Defiance county, State of Ohio, and which appointment the said Edward H. Gleason has accepted: Now, if the said Edward H. Gleason shall faithfully discharge all his duties as guardian, then the above obligation is to be void; otherwise to remain in full force.

"(Signed) EDWARD H. GLEASON. [SEAL.]
"HENRY HARDY." [SEAL.]

And your orator says that the object and true intent of the said law so requiring such person to make a statement of the whole estate of said minor, and the probable value thereof, and the probable annual rents of his real estate were for the purpose of
6 fixing the penalty of his bond in double the amount of the value of the personal property of such minor, and of the gross rents that will accrue during his minority, in which amount, with freehold sureties as aforesaid, the guardian was required by the law to enter into bond before the said probate court had jurisdiction to appoint him such guardian; but notwithstanding which, and although, as your orator alleges, upon his information and belief, he had at that time a valuable personal estate of value in an amount unknown to him, and also had real estate of large rental value to your orator unknown; but without any such statement being made, and without said Gleason having been by said court required to make such statement — the said probate court, and without any bond whatever being executed and filed or given other than the said obligation signed by any freehold surety except the said Hardy only, and which said obligation had been filed with the said court by the said Edward H. Gleason without the consent or knowledge of the said Hardy, the said probate court, in violation of law and without any authority whatever so to act issued to the said Edward H. Gleason letters of guardianship of the estate of your orator of date of the said 15th day of July, A. D. 1869, and on that day entered on the journal of the said court an order appointing him, the said Edward H. Gleason, such guardian, and thereupon the said Edward H. Gleason took the oath required by the law of the State of such guardian for the faithful discharge of his duties, and became such guardian so far as it was in [the] power of the said probate court to appoint him;
but your orator says that for failure of the said Gleason to
7 give any lawful bond as aforesaid, and otherwise comply with the law as aforesaid, the said probate court had no jurisdiction to make any order appointing the said Gleason such guardian, and that neither in law or in fact was he ever such guardian, nor ever did he have any right to exercise the duties thereof.

Your orator, further complaining, says that, notwithstanding the

manifest disqualification of the said Edward H. Gleason to act as the guardian of the estate of your orator, he, the said Gleason, on the 22nd day of July, 1869, filed in the probate court of said Defiance county his petition to sell the lands of your orator situate in the said counties of Defiance and Paulding, of which tracts to the extent of one thousand acres were held in fee-simple, unincumbered, and seven hundred and eighty-nine acres were held by tax title.

Your orator says that said petition was in due form of law and duly verified, as he is by his counsel informed, but whether the statements therein contained as to the necessity for the sale of his real estate were true or not he cannot safely say. He, as well as his mother, were made defendants to the said petition, and were served with notice that the said petition would be for hearing on the 10th day of August, 1869. His mother, Mary Arrowsmith, answered the said petition, electing to receive her dower in the proceeds of sales to be made by the said Gleason, but this your orator was not therein represented by any guardian *ad litem*, next friend, or any other representative except the said Gleason. On the said tenth day of August, the day set for the hearing of the said petition, the said court made an entry that it found that the statements in the said guardian's petition were true, and that the lands named therein,

8 including the lands hereinbefore described, ought to be sold, and appointed three freeholders of the said county of Defiance to appraise the said lands of your orator. The said appraisers made due return of the appraisement of land of your orator which the said Gleason sought to subject to sale, and appraised, held by your orator under fee-simple, unincumbered except by the dower of his mother, at the sum of fifteen thousand five hundred and seventeen dollars and fifty cents ($15,517.50), and the lands described hereinbefore in this bill at the sum of six thousand three hundred and forty-seven dollars and fifty cents ($6,347.50), and the lands held by tax title at the sum of six thousand and eighty-five dollars ($6,085.00), making a total appraisement of all the lands of your orator in the said counties of Defiance and Paulding twenty-one thousand six hundred and two dollars and fifty cents ($21,602.50), which appraisement was by the said court on the 17th day of August, 1869, duly approved and confirmed.

Your orator, further complaining, says that by the law then in force in the State of Ohio, and being section XXVII of chapter 51 of Swan & Critchfield's Revised Statutes of the State of Ohio (vol. 1, page 676), it was required as follows: "Upon the appraisement of the real estate of wards being filed in the probate court, signed by said appraisers, the court shall require such guardian to execute a bond, with sufficient freehold sureties, payable to the State of Ohio, in double the appraised value of such real estate, with condition for the faithful discharge of his duties, and the faithful payment and accounting for of all moneys arising from such sale according to law." And by the following section, XXVIII, as amended by an act of General Assembly of the State of Ohio, passed February 15th, 1867, it was provided that upon such bond being filed and approved

by the court it should order the sale of such real estate at either public or private sale; it being further provided that in no case should such real estate be sold at private sale for less than the appraised value thereof.

Your orator says that notwithstanding this most beneficent provision and wholesome safeguard of the law for the protection of the interests of wards, as well as those of widows and persons who might hold liens on the real estate ordered to be sold by such guardian, and those interests in said real estate thus ordered to be sold might thereby be conveyed or otherwise extinguished by the provisions then in force governing such sales, they being made parties defendant thereto, the said court, in utter disregard of the said provision of law in that behalf made, dispensed with the said provision of law, and on the 17th day of August, 1869, the day upon which the said appraisement of the lands of your orator was filed, caused the following illegal, false, and fraudulent entry to be made on the journal of said court, to wit: "And the said Edward H. Gleason having, upon his appointment as such guardian, given bond with reference to the value and sale of the real estate of the said ward, which bond is now adjudged to be sufficient for the purpose hereof, therefore the giving of additional bond is hereby dispensed with." Whereas the said court could not lawfully or rightfully entertain jurisdiction to order the sale of the said real estate of your orator except upon the said guardian giving a bond in the penal sum of at least forty thousand dollars, or, having in view the lands hereinbefore described, in the penal sum of at least thirteen thousand dollars, and with the condition therein contained for the faithful payment and accounting for all of moneys arising from such sale according to law, as required by the law before recited. Your orator says that the said illegal, false, and fraudulent entry was in contradiction of other portions of the record in the said proceedings and the files and papers in the said matter on file in the said court having reference to the said matter of the sale of the lands of your orator under proceedings instituted by the said Gleason, and that it was prior to any offer of purchase of the said lands or any portion thereof to any one seeking to purchase the same, or might have been known by him; that no bond, as required by law before any order of sale could be lawfully made, had been filed by the said Gleason, and that the said entry before recited was false, fraudulent, and contradicted by other parts of the record of the said proceeding.

Your orator, further complaining, says that on the 10th day of November, 1869, the said probate court, so far as it could, make an order of sale of the lands of your orater in the terms following, to wit: "Said guardian is ordered to sell said lands or any parcel thereof at private sale, but at not less than the appraised value thereof, and upon the following terms: One-third cash is hand on the day of sale, one-third in one year, and one-third in two years, with interest annually, and the deferred payments to be secured by mortgage on the premises sold." That in pursuance of the said pretended order of sale the said defendant, Edward H. Gleason, as the

pretended guardian of the estate of your orator, on the 15th day of November, 1869, sold the following-described lands to the said
11 John Frederick Harmening at private sale, to wit: The south-east quarter of section thirty-six (36), in township four (4) north of range three (3) east, except six and twenty-five one-hundredths acres occupied by the Toledo, Wabash and Western railway, containing, exclusive of said land, one hundred and fifty-three and seventy-one hundredths ($153\frac{7}{100}$) acres, for the sum of one thousand five hundred and thirty-seven dollars and fifty cents ($1,537.50), that being the appraised value thereof. The said guardian, on the 16th day of November, reported the said sale to the said court, and the same was by the said court approved and confirmed, and the said guardian ordered to execute and deliver to the said Harmening a deed for the said premises on his compliance with the terms of the said pretended sale, and the said guardian was further ordered to pay out of the proceeds of the said sale to Mary Arrowsmith the sum of four hundred dollars as and for her dower interest in the said premises.

Your orator, further complaining, says that on the 15th day of February, 1873, more than three years after the said pretended order of sale was entered, and without any renewal thereof or any new order of sale, and without any new or further appraisement of the lands of your orator, though the value of said lands had, as he is informed, greatly advanced, and without any new or other or further bond having been executed, as required by law then in force by the said Edward H. Gleason, he, the said Gleason, for the purpose of getting money into his hands for his own private gain, and without reference to the true interests of his said ward, your orator, in the premises, and willing to al-
12 low the said Harmening to get at a low and under-price the lands of your orator, and the said Harmening, well knowing the falsity of the entry of the said order of the said court as aforesaid, but claiming to rely on the order of the said court, sought to obtain from the said Gleason a deed for the following-described premises: the east half of the southwest quarter of section number thirty-six, township four (4) north, range three (3) east, containing eighty (80) acres, more or less, in Defiance county, Ohio; also all that part of the northeast quarter of the northwest fractional quarter lying north of the Wabash, St. Louis and Pacific railway in section one (1) township three (3) north, range three (3) east, containing seven and $\frac{1}{100}$ acres, more or less, situated in Paulding — and State of Ohio.

And the said Gleason, though there was no necessity whatever for said sale, as he, the said Gleason, and the said Harmening well knew, sold at private sale on said day the said described premises to the said Harmening for the sum of eight hundred and seventy-two dollars and ten cents ($872.10), and the said sale was, on report thereof by the said guardian to the said court, the within authority in law, wrongfully approved and confirmed, and a deed for the same ordered to be executed and delivered to the said Harmening on the 19th day of February, 1873, and the guardian further ordered to

pay to the said Mary Arrowsmith two hundred dollars as and for her dower interests in the said premises.

Your orator, further complaining, says that, notwithstanding the fact that there was no necessity for any further sale and sacrifice of the estate of inheritance received from his father by your
13 orator, nevertheless the said Gleason, pretending to act under the order of sale as before recited, and though he had in his hands large sums derived from the sale of the premises before described, as well as considerable sums which he had received from the release of tax titles on lands held by your orator, under and by virtue of certain provisions of law then in force, all of which was known to the said court and to the said Harmening, and although the same remained in his hands still unexpended for the benefit of your orator in any way, and without any new appraisement of the lands of your orator, though they had risen greatly in value since the said appraisement before recited, and without any order for an additional bond, and without any new order of sale or a reversal of the former pretended order of sale, and without any additional bond being given by the said Gleason conditioned for the faithful discharge of his duties, and faithfully accounting and payment of all moneys arising from the said proposed sales to be made, and though the said Gleason had in his hands large sums of money in no way secured to be paid out by any bond, except the original defective and unlawful bond before recited, the said Edward H. Gleason, for the purpose of getting money into his hands for his own private gain, without reference to the true interest of your orator in the premises, and willing that the said Harmening should get the lands bought at a low and under price, connived and colluded with him, the said Harmening, to sell the said lands hereinafter described in violation of his duties and the trust imposed on him, claiming to act on the said order of sale long since entered in said court, on the
14 4th day of December, 1874, sold to the said Harmening the following-described lands situated in Defiance county aforesaid, viz: the north half of section thirty-six, in township four north of range three east, and the west half of the same section in the same township and range, containing, together, four hundred acres, for the sum of six thousand dollars, and reported the sale to the said court on the same day, and the same was, without proper examination or opportunity for the friends of the said ward, your orator, or his relatives to examine the same and advise the said court or the said Gleason in the premises, improperly — illegally confirmed the said sale, and ordered the said guardian to make, execute, and deliver a deed for the same to the said Harmening on his compliance with the terms of sale, and further ordered the said guardian to pay out of the proceeds of said sale the sum of fifteen hundred dollars as and for the dower interest therein held by the said Mary Arrowsmith; all of which, the said —, was in violation of law and without authority thereof.

Your orator says that all the sales made by the said Gleason were in violation of his trust, and that the pretended confirmations thereof and the deeds made in pursuance thereof were each and all of them

made and done in violation of law, and were in fraud of the rights of your orator in the premises, as the said Harmening and the said Gleason well knew.

Your orator further says that he has never received from the said Gleason, or from any other source, to his knowledge, any of the proceeds of sales made to said Harmening, nor to his knowledge, best information, and belief none of the proceeds thereof have been applied for his benefit in any way, but the whole have been converted to the use of the said Gleason, so that he is utterly without remedy at law to recover therefor.

Your orator says that the said G. Harmening placed the deeds for said lands so sold to him on record in the said counties of Defiance and Paulding, and that the said deeds, order of court so as aforesaid made, and the several entries of confirmation thereof are all and each of them in fraud of your orator's rights in the premises and cloud the title to the said lands so that he cannot effectually dispose of them or otherwise make any beneficial use of them.

Your orator annexes hereto as an exhibit a copy of the original bond of said Edward H. Gleason, given by him on his appointment, a copy of the letters of guardianship, a copy of the order of appointment of said guardian, and a copy of the record of the said court containing the entries of all the proceedings touching the said sales, as hereinbefore recited, which he prays may be held to be part of this his bill.

Your orator says that in the year 1869 he went with his mother to the State of Nevada to reside, and has ever since then been a resident and citizen of that State.

Your orator further says that the said John Frederick Harmening held the said lands and tenements up to the time of his death, and took and used all the rents and profits thereof in an amount which is unknown to your orator.

The said John Frederick Harmening, on the — day of ——, 1884, died in Defiance county, leaving as his heirs-at-law his minor children, Lydia M. Harmening, of the age of more than fourteen years; Carl H. Harmening, of the age of more than fourteen years; William F. Harmening, of the age of under fourteen years, and Fritz Harmening, of the age of less than fourteen years, neither of whom have any guardian of person or estate, and Amelia Harmening, his widow, who has a, or claims a, dower interest in the said premises, and who has been appointed administratrix of the estate of the said John Frederick Harmening, deceased, all of whom are now in possession of the said lands and receiving the rents and profits thereof as the legal heirs and representatives of the said deceased Harmening, claiming to hold the same by virtue of the said pretended deeds, sales, and doings of the said court, as hereinbefore set forth; that said Edward H. Gleason has been for a long time past utterly insolvent, so that action at law against him would be wholly unavailing.

Your orator is willing and ready and here offers to do whatever this honorable court may require of him as just, proper, and equitable in the premises as a condition for the relief herein by him prayed.

Your orator therefore prays the court to render a decree setting aside and vacating the said order of sale of the said probate court, and all the proceedings thereof affecting the title of your orator to the said lands and tenements, and declaring the same and the deeds made in pursuance thereof to be void and of no effect; that an account be taken of the rents and profits of the said lands and tenements received by the said Harmening in his lifetime, and by the said defendants since his death, if any, and that your orator may have such further — other relief in the premises as the nature of the circumstances of this case may require and to this honorable court shall seem meet.

17 And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to William F. Harmening and Lydia M. Harmening, infants over the age of fourteen years, and for Carl H. Harmening, Fritz H. Harmening, infants under the age of fourteen years, and for Amelia Harmening personally and as administratrix of estate of John Frederick Harmening, deceased, and Edward H. Gleason, all of whom are resident in the county of Defiance, in the northern district of Ohio, western division, defendants herein, commanding them on a day certain, therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to perform and abide such further order, direction, and decree as may be made against them or either of them.

And your orator, as in duty bound, will ever pray, etc.

NEWBEGIN AND KINGSBURY,
Solicitors for Complainant.
A. L. LALLY, *Of Counsel.*

UNITED STATES OF AMERICA, }
Northern District of Ohio, Defiance County, } *ss:*

Dick E. Arrowsmith, being first sworn, on his oath says that he is the complainant named in the foregoing bill, and that the matters of fact therein charged are true in substance and fact, as charged, except as to those matters charged on information and belief, which he is informed and believes are true; that he has had the allegations of the said bill read over to him, and knows of what they consist.

D. E. ARROWSMITH.

18 Sworn to before me and in my presence subscribed this 24th day of October, A. D. 1884.

[SEAL.] F. W. STURDIVANT,
Notary Public for said County.

Petition to Sell Bonds.

Defiance County Probate Court. December, A. D. 1874.

EDWARD H. GLEASON, Guardian of Dick Evans Arrowsmith,

vs.

His said Ward and MARY ARROWSMITH.

DECEMBER 4, 1874.

Proceedings had in the probate court of Defiance county, Ohio, at a term thereof held at Defiance, in said county, on the 4th day of December, 1874, by and before Jacob I. Green, judge of said court.

Be it remembered that heretofore, to wit, on the 22nd day of July, 1869, Edward H. Gleason, guardian of Dick E. Arrowsmith, a minor, filed in the probate court of Defiance county his certain petition, which, in words and figures, is as follows, to wit:

To the probate court of the county of Defiance, Ohio:

Your petitioner, Edward H. Gleason, represents that he is the duly apppointed and qualified guardian of Dick Evans Arrowsmith, now of the age of six years, and residing with his mother at the residence of Renaldo Evens, in the county of Defiance, Ohio; that no personal estate of any kind belonging to said ward ever came to the possession or knowledge of the petitioner; that there is no personal estate of said ward dependent upon the settlement of any decedent's estate or the execution of any trust nor expectancy; that said ward is the owner of the fee-simple of the following-described real estate, situate in Defiance county, Ohio, and described as follows, to wit:

19 All of section thirty-six, in township four north of range three east, except $5\frac{25}{100}$ acres out of the southeast quarter of said section occupied by the railway, containing $634\frac{75}{100}$ acres; also, the southeast quarter of section twenty-eight, in township No. five, range No. one, Milford t'p, containing one hundred and sixty acres; also the west half of the southeast quarter of section thirty-four, township five, range one, in said township, containing 80 acres; also the southwest quarter of section twenty-three, in township four, range one, in Hicksville township, containing one hundred and sixty acres; also the northwest part of northwest quarter of section No. one, in township No. three north of range three east, in the county of Paulding, Ohio, containing about 7 acres; that said ward is also the owner of the fee-simple, by virtue of tax title, of the following-described real estate situate in the county of Defiance, Ohio, and described as follows, to wit: The east half of the southwest quarter of section No. seven, in township No. four north of range No. three east, Delaware township, containing $79\frac{32}{100}$ acres; also the southwest quarter of section No. thirteen, township five north, range 4 east, in Tiffin township, containing one hundred and sixty acres; also the whole of section ten, in township No. four north of range No. two east, except one hundred acres off of the east side of said section, containing five hundred and forty acres; also north part west fraction northwest quarter of section nineteen, township four north,

range two east, Mark t'p, containing forty-nine $\frac{10}{100}$ acres; also the northwest quarter of section No. twenty-six, township 4 north of range No. 1 east, containing forty acres in Hicksville township; also the southwest quarter of section No. 27, in township four north of range one east, in Hicksville township, containing one hundred and sixty acres, all of which is wild lands and yields no income; that the petitioner has received no rents whatever from any of said ward's real estate; that the sale of said real estate is necessary for the maintenance and education of said ward; that said ward is indebted to Rinaldo Evens for boarding and lodging in the sum of two hundred and ten dollars; there are no liens upon said real estate to the knowledge of the petitioner; that Mary Arrowsmith, widow of John C. Arrowsmith, has a dower interest in said lands.

Your petitioner therefore prays that said Dick Evans Arrowsmith and Mary Arrowsmith may be made defendants to this petition; that dower may be set off to said widow, and that your petitioner may be ordered to sell said real estate for the purposes above set forth and for other proper relief.

EDWARD H. GLEASON,
Guardian of Dick Evans Arrowsmith.

THE STATE OF OHIO, }
Defiance County, } ss:

I, Edward H. Gleason, being duly sworn, say that the statements in the foregoing petition are true to the best of my knowledge and belief.

EDWARD H. GLEASON.

Sworn to and subscribed before me and in my presence this 22nd day of July, A. D. 1869.

JACOB I. GREEN,
Probate Judge.

And thereupon in said court in said case was entered the following order, to wit:

Petition to Sell Land.

Defiance Probate Court.

EDWARD H. GLEASON, Guardian of Dick Evans Arrowsmith, a Minor,
vs.
Ward and MARY ARROWSMITH.

JULY 22, 1869.

This day came the said Edward H. Gleason, as guardian of Dick Evans Arrowsmith, and filed his petition duly verified, asking for the sale of real estate of his said ward therein described; whereupon it is by the court ordered that said Edward H. Gleason shall cause notice to be given to said Dick Evans Arrowsmith, and also to Mary L. Arrowsmith, widow of John C. Arrowsmith, deceased, in writing personally; or, if that cannot be done,

then by leaving copies thereof at their usual place of residence five days before the day of hearing of said application to sell said real estate, which time of hearing is hereby fixed by the court for the 10th day of August, A. D. 1869, at 10 o'clock a. m.

JACOB I. GREEN,
Probate Judge.

And thereafter, on the 25th day of July, 1869, was filed in said court the following notice of service and proof of service thereof as follows, to wit:

To Dick Evans Arrowsmith and Mary Arrowsmith:

You are hereby notified that on the 22nd day of July, A. D. 1869, Edward H. Gleason, as guardian of Dick Evans Arrowsmith, filed in the probate court of Defiance county, Ohio, a petition, the object and prayer of which is to procure said court to order the sale of the real estate of the said Dick Evans Arrowsmith, situate in the counties of Defiance and Paulding, Ohio, and described as follows, to wit: The whole of section 36, T. 4 N., R. 3 E., Defiance county, Ohio (Delaware township), except $5\frac{25}{100}$ acres out of the S. E. q'r of said section, occupied by the railway, containing $634\frac{74}{100}$ acres; also the S. E. $\frac{1}{4}$ of sec. 28, T. 5 N., R. 1 E., Milford township, containing 160 acres; also the west $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of sec. 34, T. 5 N., R. 1 E., Milford township, containing 80 acres; also the S. W. $\frac{1}{4}$ of sec. 25, T. 4, R. 1, Hicksville township, containing 160 acres; also the N. E. p't of N. W. $\frac{1}{4}$, sec. 1, T. 3, R. 3, Paulding county, Ohio, containing 7 acres; also the following lands held by tax title, to wit: The east half of the S. W. $\frac{1}{4}$ of sec. 7, T. 4 N., R. 3 E., Delaware township, containing $79\frac{30}{100}$ acres; also the S. W. $\frac{1}{4}$ of sec. 13, T. 5, R. 4, Tiffin township, containing 160 acres; also the whole of section 10, T. 4, R. 2 E., in Mark township, except 100 acres off the east side of said section, containing 540 acres; also the north part or frac. N. W. $\frac{1}{4}$ of sec. 19, T. 4, R. 2, Mark t'p, containing $49\frac{10}{100}$ acres; also N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$, sec. 26, T. 4, R. 1, containing 40 acres; also the S. W. $\frac{1}{4}$ of sec. 27, T. 4, R. 1, both Hicksville township, containing 160 acres, for the support and education of the said Dick Evans Arrowsmith and to pay any indebtedness that may now stand against him, and that dower may be assigned to said Mary Arrowsmith in the premises. The application thereof will be for a hearing by said court on the 10th day of August, A. D. 1869, at 10 o'clock a. m., at which time, unless you show cause to the contrary, an order will be asked, as prayed for in said petition.

22

EDWARD H. GLEASON,
Guardian of Dick Evans Arrowsmith.

Dated this 23rd day of July, A. D. 1869.

THE STATE OF OHIO, }
Defiance County, } ss:

I, Edward H. Gleason, being duly sworn, say that on the 23rd day of July, 1869, I served personally the within-named Mary A. Arrowsmith with a true copy of the within notice, and on the same

day served the within-named Dick Evans Arrowsmith, by leaving a true copy of this notice at his usual place of residence.

E. H. GLEASON.

Sworn to and subscribed before me this 23rd day of July, A. D. 1869.

JACOB I. GREEN,
Probate Judge.

And also on said 23rd day of July, A. D. 1869, was filed in said court the following answer to said petition, to wit:

Petition to Sell Real Estate. Answer.

Probate Court of Defiance County, Ohio.

EDWARD H. GLEASON, Guardian of Dick Evans Arrowsmith,
vs.
DICK EVANS ARROWSMITH and MARY ARROWSMITH.

And now comes the said Mary Arrowsmith, defendant, and widow of John C. Arrowsmith, deceased, and for answer to the petition filed in this case hereby waives the assignment of dower by metes and bounds in the real estate described in said petition, and asks the court to have the said real estate sold free of dower, and
23 to allow her in lieu thereof such sum of money out of the proceeds as the court may deem the just and reasonable value of her dower interest therein.

MARY A. ARROWSMITH.

And afterwards, to wit, on the tenth day of August, in the year 1869, was entered in said cause by said court the order of appraisement following, to wit:

Petition to Sell Land.

Defiance Probate Court.

EDWARD H. GLEASON, Guardian of Dick Evans Arrowsmith, a Minor,
vs.
His said Ward and MARY A. ARROWSMITH.

AUGUST 10TH, 1869.

This day this cause came on to be heard upon the petition and answer of Mary A. Arrowsmith and testimony, and it appearing to the court that the notice heretofore ordered to be given to the defendants has been duly served upon the said defendants, and the evidence thereof with the notice has been filed in this court, and the court being fully advised in the premises, do find that the statements in the petition are true, and that said real estate therein named ought to be sold. Thereupon it is ordered that Jacob Karst, Isaac Corwin, and John W. Slough, judicious freeholders of Defiance county, and not of kin to the petitioner, shall, upon actual view of the premises and upon their oaths, truly and impartially

appraise said real estate at its fair cash value, and of their proceedings make return to this court by the 17th day of August next.

JACOB I. GREEN,
Probate Judge.

And thereupon was issued out of said court the warrant following, to wit:

To Isaac Corwin, John W. Slough, and Jacob Karst.

GENTLEMEN: In the case of Edward H. Gleason, guardian of Dick Evans Arrowsmith, *vs.* His Ward and Others, you have been appointed by the probate court of Defiance county, Ohio, upon your oaths and upon actual view of the premises, to truly and impartially appraise at a fair cash value the following-described real es-
24 tate situate in Defiance and Paulding counties, Ohio, to wit: The whole of sec. 36, T. 4 N., R. 3 E, in Defiance township, Defiance county, Ohio, except $5\frac{25}{100}$ acres out of the S. E. $\frac{1}{4}$ of said section occupied by the railway, leaving $634\frac{75}{100}$ acres; also the S. E. $\frac{1}{4}$ of sec. 28, T. 5 N., R. 1 E., Milford township, containing 160 acres; also the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of sec. 34, T. 5 N., R. 1. E., Milford township, containing 80 acres; also the S. W. $\frac{1}{4}$ of sect. 23, T. 4 N., R. 1 E., Hicksville township, containing 160 acres; also the N. E. pt. of N. W. $\frac{1}{4}$ of section 1, T. 3 N., R. 3, in Paulding county, Ohio, containing about 7 acres. Also the following lands held by tax title, to wit: The E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of sec. 7, T. 4 N., R. 3 E., Delaware township, containing $79\frac{32}{100}$ acres; also the S. W. $\frac{1}{4}$ of sect. 13, T. 5 N., R. 4 E., Tiffin township, containing 160 acres; also the whole of section 10, T. 4 N., R. 2 E., in Mark township, except 100 acres off of the east side of said section, leaving 540 acres; also the N. part of W. fraction of N. W. $\frac{1}{2}$ of section 19, T. 4 N., R. 2 E., Mark township, containing $49\frac{10}{100}$ acres; also N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of sec. 26, T. 4 N., R. 1 E., Hicksville township, containing 40 acres; also the S. W. $\frac{1}{4}$ of sec. 27, T. 4 N., R. 1 E., Hicksville township, containing 160 acres. You will make return of your appraisement by the 17th day of August, A. D. 1869.

Witness my hand and the seal of said court, this 10th day of August, A. D. 1869.

[SEAL.] JACOB I. GREENE,
Probate Judge.

Which warrant was on the 17th day of August, 1869, returned to and filed in said court, endorsed as follows, to wit:

THE STATE OF OHIO, }
Defiance County, } *ss:*

We, Isaac Corwin, John W. Slough, and Jacob Karst, the within-named appraisers, being duly sworn, severally say that we will, upon

actual view of the premises, truly and impartially appraise said real estate at its fair cash value in pursuance of the order of said court.

ISAAC CORWIN.
J. W. SLOUGH.
J. KARST.

25 Sworn to and subscribed before me this 10th day of August, A. D. 1869.

JACOB I. GREENE,
Probate Judge.

In obedience to the order of the court hereto attached, being first duly sworn, and upon actual view of the premises therein described, we, the undersigned appraisers, do estimate the real cash value of said real estate unencumbered by dower as follows, to wit: The whole of section 36, T. 4 N., R. 3 E., in Delaware township, Defiance county, Ohio, except $5\frac{25}{100}$ acres out of the S. E. $\frac{1}{4}$ of said section, occupied by the railway, leaving $634\frac{75}{100}$ acres, at $6,347.50; the S. E. $\frac{1}{4}$ of sec. 28, T. 5 N., R. 1 E., Milford township, containing 160 acres, at $5,000.00; the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of sec. 34, T. 5 N., R. 1 E., Milford township, containing 80 acres, at $2,500.00; the S. W. $\frac{1}{4}$ of sec. 23, T. 4 N., R. 1 E., Hicksville township, containing 160 acres, at $1,600.00; the N. E. part of the N. W. $\frac{1}{4}$ of sec. 1, T. 3, R. 3 E., in Paulding county, Ohio, containing about 7 acres, at $70.00. And the following lands held by tax titles as follows, to wit: The E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 7, T. 4 N., R. 3 E., Delaware township, containing $79\frac{32}{100}$ acres, at $560; the S. W. $\frac{1}{4}$ of sec. 13, T. 5 N., R. 4 E., Tiffin township, containing 160 acres, at $1,200.00; the whole of section 10, T. 4 N., R. 2 E., in Mark township, except 100 acres off of the east side of said section, leaving 540 acres, at $2,160; the N. part of the W. frac. of the N. W. $\frac{1}{4}$ of sec. 19, T. 4 N., R. 2 E., Mark township, containing $49\frac{10}{100}$ acres, at $245.00; the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 26, T. 4 N., R. 1 E., Hicksville township, containing 40 acres, at $320.00; the S. W. $\frac{1}{4}$ of sec. 27, T. 4 N., R. 1 E., Hicksville township, containing 160 acres, at $1,600.

(Signed) ISAAC COWIN,
J. W. SLOUGH,
JACOB KARST,
Appraisers.

And on said 17th day of August, 1869, was entered in said court the following further order in said cause, to wit:

Petition to Sell Land.

Defiance Probate Court.

EDWARD H. GLEASON, Guardian of Dick Evans Arrowsmith,
vs.
His Said Ward and MARY A. ARROWSMITH.

AUGUST 17, 1869.

26 This day came the appraisers heretofore appointed in this case and filed their report herein, which, upon examination, the court find is duly made.

It is, therefore, ordered by the court that the same be, and it is hereby, approved and confirmed; and the said Edward H. Gleason having upon his appointment as such guardian given bond with reference to the value and sale of the said real estate of his said ward, which bond is now adjudged to be sufficient for the purposes hereof, therefore the giving of additional bond is hereby dispensed with; and on the 10th day of November, 1869, was entered in said cause the order of sale following, to wit: Said guardian is ordered to proceed to sell said lands, or any parcel thereof, at private sale, but at not less than the appraised value thereof, and upon the following terms: One third cash in hand on the day of sale, one-third in one year, and one-third in two years, with interest *with interest* payable annually, and the deferred payments to be secured by mortgage on the premises sold.

JACOB I. GREENE,
Probate Judge.

And thereafter, on the 16th day of November, 1869, was filed in said court the report of sale following, to wit: In obedience to the order of court made on the 10th day of November, 1869, and in pursuance of the statute in such case made and provided, I sold on the 15th day of November, 1869, at private sale, the following-described real estate belonging to Dick Evans Arrowsmith, minor child of J. C. Arrowsmith, deceased, to wit: The southeast quarter of section No. 36, T. 4 N., R. 3 E, except $6\frac{25}{100}$ acres occupied by the Toledo, Wabash and Western railway, containing, exclusive of said land, $153\frac{15}{100}$ acres of land, to F. Harmening for the sum of $1,537.50, that being the full amount of the appraised value thereof.

November 16, 1869.

E. H. GLEASON,
Guardian of Dick Evans Arrowsmith.

And on said day, in said court, said bill was confirmed and order thereon entered as follows, to wit: Edward H. Gleason,
27 guardian of Dick Evans Arrowsmith, made report of a sale made by him of the S. E. ¼ of sec. 36, T. 4 N., R. 3 E., of the land in said petition described to F. Harmening, and the court having carefully examined his proceedings and the sale by him made, and being satisfied that said sale has in all respects been legally made, it is, on motion, ordered that said sale be confirmed, and said guardian is ordered to execute and deliver to the purchaser his deed for the premises sold upon compliance with the terms of said sale. The court affix and set off out of the proceeds of said sale as and for the dower interest of said Mary A. Arrowsmith, widow of John C. Arrowsmith, deceased, in said S. E. q'r of said sec. 36, the sum of $400, which sum said guardian is ordered to pay to her out of the moneys arising from said sale as received, and for said purpose.

JACOB I. GREENE,
Probate Judge.

And afterwards, to wit, on the 4th day of July, 1872, the following further report was filed in said court, to wit:

JULY 3, 1872.

To the probate court of the county of Defiance, Ohio:

By virtue of the authority vested in guardians by an enactment of the General Assembly of the State of Ohio, passed April 30th, 1852, Swan and Critchfield, page 680, authorizing guardians to release the interest of their wards to tax titles to real estate, I, as guardian of Dick Evans Arrowsmith, have released his interest in the tax titles to the N. W. ¼ of the S. W. ¼ of sec. 26, in Hicksville township, Definance county, Ohio, to Harriet L. and Anna W. Wright, heirs of Robert Wright, deceased, of Ft. Dodge, State of Kansas, they being entitled to redeem for the sum of $75.00, the same being the full amount of purchase- money, subsequent taxes, interest, and penalty allowed by law.

E. H. GLEASON,
Guardian.

And thereupon on said day, in said court, was entered the following, to wit:

28 *Release of Tax Title.*

Defiance Probate Court.

E. H. GLEASON, Guardian of Dick Evans Arrowsmith,
vs.
HIS SAID WARD *et al.*

This day E. H. Gleason, guardian of Dick E. Arrowsmith, a minor, filed in this court his report in the matter of the release of the tax title of his said ward in and to the N. W. ¼ of S. W. ¼ of sec. 26, Hicksville township, and being satisfied, after due consideration, that said proceedings are according to law, the same are approved, and they are hereby approved and confirmed.

JACOB I. GREENE,
Probate Judge.

And on the 19th day of February, 1875, was filed in said court the following further report of sale in said cause, to wit:

To the probate court within and for the county of Defiance and State of Ohio:

In obedience to a former order of this court, made on the 10th day of November, 1869, authorizing me to sell the real estate belonging to my ward, Dick E. Arrowsmith, at private sale, I did, on the 15th day of February, 1873, sell to Frederick Harmening, of Defiance county, Ohio, at private sale, at ten dollars per acre, that being the appraised value and the highest and best bid therefor, the following real estate belonging to my said ward, to wit: The east half of the southwest quarter of section No. 36, township four north, range three east, containing eighty acres, more or less, in Defiance county, Ohio; also all that part of the northeast quarter of the northwest fractional quarter lying north of Toledo, Wabash and Western railroad, in section one, township three north, range three east, containing

seven $\frac{21}{100}$ acres, more or less, situate in Paulding county and State of Ohio.

Dated this 19th day of February, 1873.

E. H. GLEASON,
Guardian of Dick E. Arrowsmith.

And thereupon in said court, in said cause, was entered the other and further order, to wit:

Petition to Sell Land.

Defiance County Probate Court.

EDWARD N. GLEASON, Guardian of Dick E. Arrowsmith,
vs.
29 HIS SAID WARD *et al.* FEB'Y 19, 1873.

This day came Edward H. Gleason, guardian of Dick E. Arrowsmith, a minor, having made report of a sale made by him, under a former order of this court, of the N. ½ S. W. ¼, sec. 36, Delaware township, Defiance county, Ohio, and of that part of the N. E. ¼ N. W. ¼ fract. north of the T., W. & W. railroad, sect. 1, T. 3 N., R. 3 E., in Paulding county.

And the court having carefully examined his proceedings and the sale by him made, and finding the same in all things correct, and that said sale has been legally made, the court approve and confirm the same. Said guardian is ordered to execute and deliver to the said purchaser at said sale his deed conveying all the interest of his said ward in and to said premises upon full compliance with the terms of said sale. Dower of widow in these two tracts sold fixed by the court at $200.

JACOB I. GREENE,
Probate Judge.

And on the 30th day of March, 1874, in said court, in said cause, was filed the further report, viz:

To the probate court within and for the county of Defiance and State of Ohio:

Be it known that the following real estate, belonging to my ward, Dick E. Arrowsmith, to wit, the N. W. ¼, S. W. ¼, N. p't S. E. ¼ of the west p't N. E. ¼ of sec. 10, Mark township, Defiance Co., O., being held by tax-title deed, in all 540 acres, and one C. R. Gorgas being the original owner of said real estate, and he being desirous of redeeming the same, came the 4th day of March, A. D. 1874, for that purpose, and I, after being fully advised in the premises, permitted him, the said Gorgas, to redeem said lands, he paying the taxes, interest, and penalty, according to law, in the premises, which
30 amounted to the sum of one thousand and seventy dollars, paying $1,000 down and giving his note for seventy dollars, due in two years from the 4th day of March, A. D. 1874.

E. H. GLEASON,
Guardian of Dick E. Arrowsmith.

And thereupon entry *as follows* was made in the minutes of said court as follows, to wit:

Release of Tax-Title.

Defiance Probate Court.

EDWARD H. GLEASON, Guardian of Dick E. Arrowsmith,
vs.
HIS SAID WARD *et al.*

MARCH 30TH, 1874.

This day E. H. Gleason, guardian of Dick E. Arrowsmith, a minor, filed in this court his report in the matter of the release by him as such guardian of the tax-title held by his said ward in and to 540 acres of land in section 10, in township 4 N., range 2 east, to one Gorgas, who owns the legal title, and being satisfied, after due consideration, that said release is according to law, the same is hereby approved and confirmed.

JACOB I. GREENE,
Probate Judge.

And afterwards, to wit, on the 4th day of December, 1874, further report of other sales made was filed in said court in said case as follows, to wit:

Report of Sale of Real Estate.

Probate Court of Defiance County, State of Ohio.

EDWARD H. GLEASON, Guardian of Dick Evans Arrowsmith,
vs.
HIS SAID WARD *et al.*

In obedience to the order of said court made in the above-entitled case I offered the real estate described in the petition in said case for sale at private sale, and Frederick Harmening having offered me for the following parcels of said land, to wit: The north half of section 36, town. 4 north, range three east, containing 320 acres; also the west half of the southwest quarter, in said section thirty-six, in said town. four N., range 3 E., the sum of six thousand dollars ($6,000) therefor, and that amount being more than the full appraised value of said land, and that being the highest and best offer I received therefor, I sold the same to said Frederick Harmening for said amount, payable as follows: One-third cash in hand, one-
31 third in one year from date, and one-third in two years from date, the deferred payments to be secured by a mortgage on said premises.

Dated this 4th day of December, A. D. 1874.

E. H. GLEASON,
Guardian of Dick Evans Arrowsmith.

And thereupon in said court in said cause was entered the order following, to wit:

Petition to Sell Land.

Defiance Probate Court.

EDWARD H. GLEASON, Guardian of Dick Evans Arrowsmith,
vs.
His Said Ward and MARY A. ARROWSMITH.

DECEMBER 4, 1874.

This day this cause came on to be further heard upon the motion of the petitioner to confirm a sale of land of said ward described as the north ½ of sec. 36, T. 4 N., range 3 E., 320 acres, now ½ S. W. ¼, same section, 80 acres, made in obedience to the order heretofore made in this case, and the court having carefully examined the proceedings of the petitioner in the matter of said sale under said order, and finding them in all matters correct, and being satisfied that said sale was fairly and legally made, it is ordered that the same be, and is hereby, approved and confirmed, and it is further ordered that the said petitioner make a deed of said real estate so sold to said purchaser of all the right, title, and interest of the said Dick E. Arrowsmith in and to said real estate upon full compliance with the terms of sale, and the court assign to Mary A. Arrowsmith as her dower estate and interest in said lands so sold the sum of $15,000, which said guardian is ordered to pay her out of the proceeds of this sale.

JACOB I. GREENE,
Probate Judge.

Transcript of Entry.

Defiance Probate Court.

Journal No. 3 at page 84.

DICK EVANS ARROWSMITH, a Minor.

JULY, 15, 1869.

32 This day the court appointed Edward H. Gleason to be guardian of the estate of Dick Evans Arrowsmith, born October 29, 1862. Said guardian filed his bond in the sum of $5,000.00, with Henry Hardy as surety and conditioned according to law, which bond the court approve as sufficient. Said guardian also made and subscribed an oath faithfully to discharge the duties of guardian to said minor.

JACOB I. GREENE,
Probate Judge.

THE STATE OF OHIO, } ss:
Defiance County, }

To all to whom these presents shall come, Greeting:

Know ye that the probate court within and for said county doth hereby grant the guardianship of the estate of Dick Evans Arrow-

smith, born October 29th, 1862, minor child of John C. Arrowsmith, late of said county, deceased, unto Edward H. Gleason, who is hereby fully empowered and authorized to do and perform all and singular the duties appertaining to said appointment, said guardian having given bond according to law and in all respects complied with the requisitions of the statutes in such cases made and provided.

In witness whereof the seal of said court [is] hereunto affixed.

Witness, Jacob I. Greene, judge of said court, this 15th day of July, A. D. 1869.

[SEAL.] JACOB I. GREENE,
Probate Judge.

Guardian's Bond. Filed July 15, 1869. *Jacob I. Greene, P. Judge.*

Know all men by these presents that we, Edward H. Gleason and Henry Hardy, are held and firmly bound unto the State of Ohio in the sum of five thousand dollars, for the payment of which we hereby jointly and severally bind ourselves.

33 Sealed with our seals and dated this 15th day of July, A. D. 1869.

The condition of the above obligation is such that whereas the above-bound Edward H. Gleason has this day been appointed by the probate court of Defiance county, Ohio, guardian of the person and estate of Dick Evans Arrowsmith, minor child of John C. Arrowsmith, deceased, late of Defiance county, Ohio, and which appointment the said Edward H. Gleason has accepted, now, if the said Edward H. Gleason shall faithfully discharge all his duties as such guardian then the above obligation to be void; otherwise, to remain in full force.

EDWARD H. GLEASON. [SEAL.]
HENRY HARDY. [SEAL.]

[$1 Int. Rev. stamp.]

This bond approved in open court this 15th day of July, A. D. 1869.

JACOB I. GREENE,
Probate Judge.

THE STATE OF OHIO, } ss:
Defiance County, }

I, Edward H. Gleason, guardian of Dick Evans Arrowsmith, a minor, do solemnly swear that I will faithfully and honestly discharge the duties devolving upon me as such guardian, as I will answer to God.

E. H. GLEASON.

Sworn to and subscribed before me this 15th day of July, A. D. 1869.

JACOB I. GREENE,
Probate Court.

Certificate to Copies.

THE STATE OF OHIO, } ss:
Defiance County, }

I, Jacob I. Greene, judge and *ex-officio* clerk of the probate court within and for said county, said court being a court of record, having a seal, do hereby certify that the foregoing is a full and correct copy of the final (complete) record of proceedings in case of Edward H. Gleason, guardian of Dick Evans Arrowsmith, *vs.*
34 His Said Ward and Mary A. Arrowsmith, on petition to sell land, and on record in said court, final record No. 3, beginning at page 170. I further certify that by the laws of the State of Ohio I am *ex-officio* clerk of said court, having sole custody of the records, archives, and seal of said court; that I have been duly commissioned and qualified as judge of said court, and that this attestation is in due form of law, and also that the copy of the entry of the appointment of said guardian is correctly taken from the minutes of said court, and that the attached papers are true copies of the letters issued to him, and of the bond filed by him, with the endorsements thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Defiance, O., this 10th day of November, A. D. 1883.

[SEAL.] JACOB I. GREENE,
Probate Judge and ex-officio Clerk of said Court.

And afterwards, to wit, on the 5th day of January, A. D. 1885, the following subpœna was filed in said cause in said court, to wit:

Subpœna.

THE UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Western Division, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon William F. Harmening, Lydia M. Harmening, infants over the age of fourteen years; Carl H. Harmening, Fritz H. Harmening, infants under the age of fourteen years; Amelia Harmening, personally and [as] administratrix of the estate of John Frederick Harmening, deceased, [and] Edward H. Gleason, if they be found in your district, to be and appear in the
35 circuit court of the United States in and for the division and district aforesaid, at Toledo, on the first Monday in January next, to answer a certain bill in chancery filed and exhibited in said court against them by Dick E. Arrowsmith. Hereof they are not to fail under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 27th day of October, A. D. 1884, and in the 109 year of the Independence of the United States of America.

[SEAL.] A. J. RICKS, *Clerk,*
By HALLIE W. BROWN,
Deputy Clerk.

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court in Toledo on or before the first Monday of December, 1884; otherwise, the said bill may be taken *pro confesso.*

A. J. RICKS, *Clerk.*

Rinaldo Evans has acknowledged himself security for all costs for which the complainant may be liable in this suit.

Return.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 27th day of October, 1884, at Defiance, Ohio, I made due service of this writ by delivering a true and duly certified copy thereof to the within-named Edward H. Gleason, and on same day at Ashwood, Ohio, by delivering like copies to the within-named Amelia Harmening, personally and as administratrix of the estate of John Frederick Harmening, deceased, and by leaving a like copy at the usual place of abode of each of the within-named William F. Harmening and Lydia M. Harmening, infants over the age of fourteen years, in the hands of their mother, Amelia Harmening, they each being absent from home and could not be found, and by leaving a like copy at the usual place
36 of abode of each of the within-named Carl H. Harmening and Fritz H. Harmening, infants under the age of fourteen years, in the hands of their mother, Amelia Harmening, they each being absent from home and could not be found. And on the first day of November, 1884, at Ashwood, Ohio, I made further service of this writ by delivering a true and duly certified copy thereof to the within-named Fritz H. Harmening, and by leaving a like copy at the usual place of abode of the within-named Carl H. Harmening, he being absent from home and could not be found, the within-named Fritz H. Harmening and Carl H. Harmening each being infants under the age of fourteen years.

W. F. GOODSPEED,
U. S. Marshal.
By J. C. MOORE, *Deputy.*

(Endorsed:) Returnable Dec. 1st, 1884. Rule day for appearance, Dec. 1st, 1884. Rule day for answer, Jan'y 5, 1885. Returned and filed Nov. 7th, 1884. A. J. Ricks, clerk.

And afterwards, to wit, on the 29th day of November, A. D. 1884, the following entry of appearance was filed in said cause in said court, viz:

Entry of Appearance of Amelia Harmening.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

DICK E. ARROWSMITH
vs.
EDWARD H. GLEASON *et al.* } No. 420.

Now comes Amelia Harmening, in person and as administratrix of the estate of John Frederick Harmening, and hereby enters her appearance in the above-entitled action.

37 (Signed) AMELIA HARMENING,
In Person and as Administratrix aforesaid.
By HENRY B. HARRIS AND COX AND CORCORAN,
Her Solicitors.

And afterwards, to wit, on the 29th day of November, A. D. 1884, the following motion for appointment of guardian *ad litem* was filed in said cause in said court, viz:

Motion for App'tment of Guardian Ad Litem of Minor Defendants.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

DICK E. ARROWSMITH
vs.
EDWARD H. GLEASON *et al.* } No. 420.

Now comes Amelia Harmening, one of said respondents herein, and represents to your honors, the judges of said court, that she is the mother of said respondents, Lydia M. Harmening, William Harmening, Carl H. Harmening, and Fritz Harmening, and that they are, and each of them are, minors under the age of twenty-one years, and she hereby requests and prays your honors to appoint Henry B. Harris guardian to defend this suit for each and all the said minors, respondents.

AMELIA HARMENING,
By HENRY B. HARRIS AND
COX AND COCHRAN,
Her Solicitors.

And afterwards, to wit, on the 1st day of December, A. D. 1884, the following appearance of Edward H. Gleason was filed in said cause in said court, viz:

Appearance of E. H. Gleason.

38 In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

DICK E. ARROWSMITH
vs.
EDWARD H. GLEASON *et al.* } No. 420.

Now comes the said defendant, Edward H. Gleason, and hereby enters his appearance in the above-entitled action Nov. 29th, 1884.

E. H. GLEASON.

And afterwards, to wit, on the 3rd day of Dec., 1884, the following entry of appearance was filed in said cause in said court, viz:

Appearance of Minor Defendants.

In U. S. Circuit Court, N. Dist. Ohio, W. D. In Chancery.

DICK E. ARROWSMITH, Comp't,
against
EDWARD H. GLEASON *et al.*, Resp'ts.

Now come the said minor defendants, Lydia Harmening, William Harmening, Carl Harmening, and Fritz Harmening, by Henry B. Harris, their guardian *ad litem*, and hereby enter their appearance in the foregoing action, and said Henry B. Harris, as guardian *ad litem*, hereby enters his appearance herein.

HENRY B. HARRIS,
Guardian ad litem for Lydia Harmening, Wm. Harmening, Carl Harmening, and Fritz Harmening.

And afterwards, to wit, on the 3rd day of December, being a day of the December term, A. D. 1884, of said court, the following proceedings were had in said cause in said court, viz:

39 *H. B. Harris Appointed Guardian, &c.*

DICK E. ARROWSMITH
vs.
EDWARD H. GLEASON *et al.* } No. 420.

In this cause, upon suggestion of the complainant's counsel, and it appearing that there are minor defendants who should be represented by a guardian *ad litem*, itis thereupon ordered that Henry B. Harris, a solicitor of this court, be appointed as such guardian *ad litem* for the minor defendants, Lydia M. Harmening, William F. Harmening, Carl H. Harmening, and Fritz Harmening.

And afterwards, to wit, on the 5th day of January, A. D. 1885, the following demurrer was filed in said cause in said court, viz:

Demurrer of E. H. Gleason.

United States Circuit Court in and for the Northern District of Ohio, Western Division. In Chancery.

DICK E. ARROWSMITH, Comp't,
against
EDWARD H. GLEASON *et al.*, Def'ts. } No. 420.

The demurrer of Edward H. Gleason, defendant to the complaint of Dick E. Arrowsmith, the above-named complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth:

1. That the said bill doth not contain any matter of equity whereon this court can ground any decree or give to the com-
40 plainant any relief against this defendant.

2. That the complainant has not in his said bill shown any claim or right, title, or interest whatsoever in this defendant in or to the said premises in said bill particularly mentioned and described or the subject-matter of said suit.

Wherefore and for divers other good causes of demurrer appearing in the said bill the defendant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

I, William Carter, being of counsel for the defendant, Edward H. Gleason, in the above-named suit, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WILLIAM CARTER.

THE STATE OF OHIO, }
Defiance County, } *ss:*

Edward H. Gleason, being first duly sworn, deposes and says that the foregoing demurrer is not interposed for delay, but because he is advised by his counsel that it is well founded in point of law and ought to be filed.

EDWARD H. GLEASON.

Sworn to before me by Edward H. Gleason and by him in my presence subscribed this 3rd day of January, A. D. 1885.

[SEAL.] C. T. DEATRICK,
Notary Public.

41 And afterwards, to wit, on the 5th day of January, A. D. 1885, the following demurrer was filed in said cause in said court, viz:

Demurrer of A. Harmening.

Circuit Court of the United States in and for the Northern District of Ohio, Western Division. In Chancery.

DICK E. ARROWSMITH, Comp't, }
vs. } No. 420.
EDWARD H. GLEASON *et al.*, Def'ts. }

The demurrer of Amelia F. Harmening in her own right, as well as administratrix of the estate of John Frederick Harmening, deceased, and of Lydia M. Harmening, William F. Harmening, Carl H. Harmening, and Fritz Harmening, appearing by the guardian *ad litem*, Henry B. Harris, to the bill of complaint of the said Dick E. Arrowsmith, complainant.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to

be true in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show:

1. That the said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

2. That it appears from said bill that said complainant has a plain and adequate remedy at law, to wit, an action of ejectment to recover possession of the premises in said bill of complaint described.

3. That this court has no jurisdiction to set aside and vacate the orders and proceedings of the probate court of Defiance
42 county, Ohio, or the deeds of its officer acting in pursuance thereof, and has no power to grant the relief specifically prayed for in said bill of complaint.

4. That this court has no jurisdiction to quiet title, or to remove any alleged claims upon complainant's alleged title to the lands described in the petition, because it appears from said bill of complaint that complainant is not in possession of said lands, or any part thereof.

5. That said complainant is not entitled in a court of equity to have an account of the rents and profits of the lands and tenements in the petition described, because he has not asked, and is not entitled to any equitable relief to which such an account is incidental, and which makes it right and proper for this court to order such an account.

6. That it appears from the said bill of complaint that plaintiff's mother, Mary A. Arrowsmith, had a dower estate in said premises described in the bill of complaint at the time of the said proceedings in the probate court of Defiance county, Ohio, which was directly affected by the said orders and proceedings, and that she is a necessary party to this suit, if it can be maintained, in order that equity may be done between the parties, and that she has not been made a party to said suit.

And defendants do further demur, separately, to so much of said bill of complaint as relates to the tract of land first purchased by said John Frederick Harmening, to wit: The southeast quarter of section 36, in township 4 north of range 3 east, except $6\frac{25}{100}$ths acres occupied by the Toledo, Wabash and Western railway, containing, exclusive of said land, $153\frac{71}{100}$ths acres; because as
43 to such land the said bill doth not contain any matter of equity whereon this court can found any decree or give to the complainant any relief against these defendants.

And defendants do further demur, separately, to so much of said bill of complaint as relates to the tract of land secondly purchased by said John Frederick Harmening, to wit: The east half of the southwest quarter of section No. 36, township 4 north, range 3 east, containing 80 acres, more or less, in Defiance county, Ohio; and also that part of the northeast quarter of the northwest fractional quarter lying north of the Wabash, St. Louis and Pacific railway, in section 1, township 3 north, range 3 east, containing seven and $\frac{21}{100}$ acres, more or less, situated in Paulding — and State of Ohio; because as to such lands the said bill doth not contain any matter

of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

And these defendants do further demur separately to so much of said bill of complaint as relates to the tract of land lastly purchased by the said John Frederick Harmening, to wit: The north half of section 36, in township 4 north of range 3 east, and the west half of the southwest quarter of the same section, in the same range and township, containing together 400 acres; because as to such land the said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendants do demur thereto and the several parts thereof, and humbly demand the judgment of this
44 court whether they shall be compelled to make any further or other answer to said bill, or to any part thereof, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

COX AND COCHRAN, AND
HENRY B. HARRIS,
Att'ys for Def'ts.

I, Jacob D. Cox, being of counsel for the defendants in the above-named suit, do hereby certify that in my opinion the foregoing demurrer is well founded in points of law.

J. D. COX.

STATE OF OHIO, }
Defiance County, } *ss:*

Amelia F. Harmening, being first duly sworn, deposes and says that the foregoing demurrer is not interposed for delay, but because she is advised by her counsel that it is well founded in point of law and ought to be filed.

AMELIA HARMENING.

Subscribed in my presence and sworn to before me by the said Amelia F. Harmening this 31st day of December, A. D. 1884.

[SEAL.] JOHN W. MILLER,
Notary Public in and for Defiance County, Ohio.

And afterwards, to wit, on the 9th day of June, being a day of the June term, A. D. 1885, of said court, the following proceedings were had in said cause in said court, viz:

Present: Hon. E. S. Hammond and Hon. Martin Welker, judges.

Demurrers Allowed & Bill Dismissed.

DICK E. ARROWSMITH }
vs. } No. 420.
EDWARD H. GLEASON *et al.* }

45 This day came the parties by their counsel, and come on to be heard the demurrers to the complainant's bill, and *was* argued by counsel; and thereupon, upon consideration, it is ordered that the

said demurrers be allowed and the bill be dismissed with costs, to be taxed at $——, for which execution may issue as upon judgments at law. And thereupon the complainant prayed an appeal to the next term of the Supreme Court of the United States, which appeal is allowed upon complainant entering into a bond in the penal sum of $500, and, said bond having been tendered in open court, is by the court approved.

46 Know all men by these presents that we, Dick E. Arrowsmith, as principal, and Henry Newbegin, as surety, are held and firmly bound unto Edward H. Gleason, Amelia Harmening, Lydia M. Harmening, C. H. Harmening, Fritz Harmening, and William Harmening in the sum of five hundred dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this ninth day of June, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the above-bounden Dick E. Arrowsmith has appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the ninth day of June, A. D. 1885, in a cause wherein the said Dick E. Arrowsmith was complainant and the said obligees were respondents:

Now, therefore, the condition of this obligation is such that if the above-named appellant, Dick E. Arrowsmith, shall prosecute his appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against him as such appellant herein, then this obligation to be void; otherwise, to remain in full force and effect.

(Signed) DICK E. ARROWSMITH, [SEAL.]
By HENRY NEWBEGIN, *His Attorney.*
HENRY NEWBEGIN. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

Approved in open court, as shown by record, and filed June 9th, 1885.

47 *Certificate.*

UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Western Division, }

I, August J. Ricks, clerk of the circuit court of the United States for said division and district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Dick Evans Arrowsmith is the complainant and Edward H. Gleason, Amelia F. Harmening, personally and as administratrix of John F. Harmening, deceased; Henry B. Harris, guardian *ad litem* for Lydia M. Harmening; William F. Harmening, Carl H. Harmening, and

Fritz Harmening are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Toledo, in said district, this 2nd day of October, A. D. 1885, and in the one hundred and ninth year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 1107. Dick E. Arrowsmith, appellant, *vs.* Edward H. Gleason, Amelia F. Harmening, individually and as administratrix of John F. Harmening, deceased, and Lydia M. Harmening *et al.*, by Henry B. Harris, guardian *ad litem.* Filed October 16, 1885. [Stamped:] Supreme Court U. S. Received Oct. 12, 1885. Clerk's office.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 133.

OCTOBER TERM, A. D. 1888.

DICK E. ARROWSMITH,
Appellant,

vs.

EDWARD H. GLEASON, AMELIA F. HARMENING, INDIVIDUALLY AND AS ADMINISTRATRIX OF JOHN F. HARMENING, DECEASED, ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Brief for Appellant.

HENRY NEWBEGIN,
BENJ. B. KINGSBURY,
Attorneys for Appellant.

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1888.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 133.

OCTOBER TERM, A. D. 1888.

DICK E. ARROWSMITH,
Appellant,
vs.
EDWARD H. GLEASON ET AL.,
Appellees.

Brief for Appellant.

STATEMENT OF THE CASE.

This was a case in equity, arising in the Circuit Court of the United States for the Northern District of Ohio, Western Division.

An original bill to impeach an order of sale, decree or judgment of the Probate Court of Defiance County, Ohio, for want of jurisdiction, error, fraud and collusion, and to vacate the deeds given in pursuance thereof, was, on the 27th day of October, A. D. 1884, filed by complainant within one year after he attained his majority. To this a demurrer was filed by the defendant, Edward H. Gleason, and by the other defendants as the administratrix and widow and heirs at law of John Frederick Harmening, the purchaser of the lands (described in the bill) at said sale. The demurrers were sustained by the Circuit Court, and a final decree rendered therein dismissing the bill of complaint, to which order and decree this appeal is now prosecuted to this Supreme Court.

The original bill may be summarized as follows: 1st. Dick E. Arrowsmith, a citizen of Nevada, alleges that he is the equitable owner of a tract of six hundred and thirty-three and seventy-five one hundredths acres of land in Defiance county, and seven and twenty-one one hundredths acres in Paulding county, Ohio, as the sole heir at law of his deceased father, John C. Arrowsmith, subject only to the dower estate of his mother, Mary A. Arrowsmith.

That on the 15th day of July A. D. 1869, the complain ant being then six years old, the defendant, Edward H. Gleason, applied to the Probate Court of said Defiance County for the appointment of a guardian of the estate of the complainant. That there was then in force the following provision of law of Ohio, to wit: Before any person shall be appointed guardian of the estate of any minor, he shall file in the court having such appointment to make, a statement of the whole estate of said minor and the probable value thereof, and also the probable annual rents of such minor's real estate, and shall verify the same by affidavit, and shall give bond, with freehold sureties, payable to the State of Ohio, in double the amount of the personal estate belonging to said minor, and also of the gross amount of rents that will be probably received by the guardian from the real estate of said minor during his or her minority, which bond shall be conditioned for the faithful discharge of the duties of said person as such guardian, and shall be approved by the court making such appointment.

Swan & Critchfield, Rev. Stats. Ohio, p. 671.

The verified statement was not filed and bond with but one surety was filed in the penalty of five thousand dollars. There is an allegation that this surety only signed the bond provisionally, and that it was delivered and filed in the Probate Court without the knowledge of the surety Hardy.

The condition of this bond is that the defendant Gleason should faithfully discharge all his duties as guardian.

The claim in the bill is that the court could not lawfully appoint defendant Gleason without the preliminary verified statement mentioned, or without filing a bond with *"sureties"*

—that is, more than one surety. And for these defects the court had no jurisdiction to make an order appointing him guardian, and so he was not in law or fact such guardian, or had any right to exercise its duties. (Printed Record, pp. 1, 2, 3.)

2. That notwithstanding his disqualification he filed in the said court on the 22d day of July, 1869, a petition to sell the lands of complainant situated in the counties of Defiance and Paulding, describing one thousand acres as held by fee simple, and seven hundred and eighty-one acres by tax title.

the petition was in due form and duly verified. The complainant herein and his mother were made parties defendant to the proceeding and notified that the petition would be for hearing on the 10th day of August following. His mother answered electing to take her dower out of the proceeds of sale as was then provided by the law of Ohio. No guardian *ad litem* was appointed (nor is it claimed that any was required by the laws of Ohio to be appointed).

On the 10th of August the day set for hearing, the court found the statements of the petition of the guardian were true and that the lands described ought to be sold and an appraisement ordered to be made by three freeholders of the said county, as provided by law. The appraisers made return of appraisement, to wit, of lands held by complainant in fee simple at an aggregate of $15,517.50; and the lands in the bill described as *sold* at $6,347.50, and the lands held by tax title at $6,085 or a total appraisement of $21,602.50. This appraisement was filed August 17, 1869, and approved.

3. The laws of the State of Ohio at that time required before a sale of lands of a ward could be made, a sale bond should be executed. The provision is found in Section XXVII, of Chapter 51, of Swan and Critchfield's Statutes of Ohio, Vol. 1, page 676, and is as follows:

"Upon the appraisement of the real estate of wards being filed in the Probate Court, signed by said appraisers, the court shall require such guardian to execute a bond with sufficient freehold sureties, payable to the State of Ohio, in

double the appraised value of such real estate, with condition for the faithful discharge of his duties, and the faithful payment and accounting for all moneys arising from such sale according to law." Upon such bond being filed and approved by the court it should order the sale of such real estate at public or private sale; it being further provided that in no case should such real estate be sold at private sale for less than the appraised value.

Printed Record, pp. 4 and 5.

4. This provision of law was dispensed with by the Probate Court in an entry on the journal of the court (which is charged in the bill as "illegal, false and fraudulent"), on the 17th day of August, 1869.

Which is in these words: "And the said Edward H. Gleason having, upon his appointment as such guardian, given bond with reference to the value and sale of the real estate of the said ward, which bond is now adjudged to be sufficient for the purpose hereof, therefore the giving of additional bond is hereby dispensed with."

That a bond for $40,000 should have been required and executed, or with reference to the tracts actually sold a bond of $13,000 should have been required to be executed before the order of sale should be made, and consequently that the court acquired no jurisdiction to order the sale of complainant's lands.

5. The order of sale was actually entered on the 10th day of November, 1869, in the following terms:

"Said guardian is ordered to sell said lands or any parcel thereof, at private sale, but at not less than the appraised value thereof, upon the following terms: One third cash in hand on the day of sale, one third in one year, and one third in two years with interest annually and the deferred payments to be secured by mortgage on the premises sold."

That thereupon the guardian on the 15th day of November, 1869, sold at private sale 153 75-100 acres to John Frederick Harmening for the appraised value, $1,537.50, who reported it to the Probate Court on the next day, and it was then approved and the guardian ordered to execute a

deed to the said Harmening on his compliance with the order of sale and the guardian ordered to pay over to Mary Arrowsmith $400 as the value of her dower interest in the premises sold.

6. The bill further recites that on the 15th day of February, 1873, more than three years after the order was entered, the said guardian, though the land had risen greatly in value, without any new or further appraisement, or renewal of the order of sale, without any new or other bond being given, the said defendant Gleason for the mere purpose of getting money into his hands for his own private gain, and willing to allow Harmening to get the same at a low and under price, with knowledge on the part of Harmening of the falsity of the order of the court, but claiming to rely on it, sought to obtain from the guardian a second tract, described in bill of 87 21-100 acres of land situated partly in Defiance and partly in Paulding counties, and that tract was, as reported, sold by Gleason to Harmening at private sale for the sum of $872.10, the appraised value made August 17, 1869, and this sale was in form approved by the court on the 19th day of February, 1873, and deed ordered to be executed as before, and the widow's dower fixed at $200, and ordered to be paid out of the proceeds of sale.

7. The bill further narrates that notwithstanding there was no necessity for any further sale or sacrifice of the inheritance of complainant, though he, Gleason, held large sums of money in his hands arising not only from the sales before mentioned, but other sums received from release of tax titles under provisions of statutes then in force, the said guardian, in connivance and collusion with Harmening, on the 4th day of December, 1874, more than five years after the order of sale and without any new bond or further bond, without any new order of sale, or revival of the pretended order, made on the 10th day of November, 1869, and without any re-appraisement, sold to Harmening a third tract of 400 acres at $6,000; that the sale was reported to the court and approved on the same day without any examination or opportunity for ex-

amination by the friends or relatives of the complainant, and $1,500 ordered paid out to Mrs. Arrowsmith.

8. That the sales, each and all, were in violation of law, in fraud of the complainant to the knowledge of Harmening.

9. None of the proceeds of these sales ever came to the hands of complainant or were expended for his benefit, but were wholly converted by Gleason to his own use, who is alleged to be for a long time past utterly insolvent, so that an action at law against him would be wholly unavailing.

10. That the said Harmening placed the deeds received from the guardian on record; that they are each, and all, the proceedings aforementioned and in fraud of complainant's right cloud his title, so he can not, beneficially, use them.

11. An exhibit of the proceedings of the Probate Court touching these sales, including copies of letters of guardianship—copy of order of appointment—is made.

Printed Record, pp. *10 to 22*, inclusive.

12. Complainant went to Nevada with his mother in 1869 and has ever since been a resident and citizen of that State.

13. That said John Frederick Harmening held possession of the premises and took, and used all the rents and profits to an amount unknown.

14. That he died on the — day of ———, 1884, leaving the widow and several children named as his heirs, and they were at the time of filing the bill in possession of the premises claiming to hold them under and by virtue of the pretended deeds, sales and doings of the court.

15. There is an offer to do equity.

The prayer is for a decree setting aside and vacating the said order of sale of the said court and all the proceedings about it declaring them, and the deeds executed in pursuance of them, null and void, for an account of the rents and profits and for general relief.

Assignment of Errors.

I. The Circuit Court erred in sustaining the demurrer of defendant, Edward H. Gleason, either

1st. For want of equity as to them.

2nd. Or for want of any showing in the bill that he had any claim or right or title or interest whatsoever in the premises.

II. The Circuit Court erred in sustaining the joint demurrer of Amelia Harmening and the children of John Frederick Harmening, either for

1st cause. That the bill contained no matter of equity.

Or 2nd. That it appears from the bill that complainant has an adequate remedy at law.

Or 3d. That the court was without jurisdiction to set aside and vacate the orders and proceedings of the Probate Court of Defiance County, Ohio, or the deeds of its officer, acting in pursuance thereof, and has no power to grant the relief specifically prayed for.

Or for the 4th cause. That the court has no jurisdiction to quiet title or to remove any alleged claims, because, it appears, complainant is not in possession of any of the lands.

Or for the 5th cause. That complainant is not entitled to an account for rents and profits under the allegations of the bill.

Or for the 6th cause. Because Mary A. Arrowsmith is a necessary party to the suit, because she had a dower estate in the premises described.

Or for want of equity as to any allegations touching severally the three tracts specifically described in the demurrer.

BRIEF AND ARGUMENT.

I. The Circuit Court had jurisdiction to vacate and annul the proceedings of the Probate Court of Defiance County.

The ground of demurrer, being the third in the demurrer of the defendant Harmening's is untenable.

(Printed record p. 27.)

Gaines v. *Fuentes*, 92 U. S. 10.

Johnson v. *Waters*, 111 U. S. 640, 667.

II. As to the grounds of demurrer of the defendant Gleason.

He is a necessary party because he is the party to the fraud alleged to have been practiced upon the complainant, appellant, and a party plaintiff in the proceedings complained of.

Harwood v. *Railroad Co.*, 17 Wall. 78.

Gaylords v. *Kelshaw*, 11 Wall. 81.

III. As to general ground of demurrer that the bill is without any equity.

An original bill to annul judgments, decrees or other final orders for fraud, accident or mistake, is a common and unquestionable remedy in equity, and the allegations of the bill of the appellant bring this case within all the requirements of equity jurisdiction.

Freeman on Judgments, § 495.

Davis v. *Tileston*, 6 How. U. S. 114.

Sheldon v. *Tiffin*, 6 How. U. S. 163.

Long v. *Mulford*, 17 O. S. 484.

Darst v. *Philips*, 41 O. S. 514.

Johnson v. *Waters*, 111 U. S. 640.

Baker v. *Riordan*, 65 Cal. 368.

Taylor v. *Walker*, 1 Heiskell, 734.

Newcomb v. *Dewey*, 27 Ia. 381.

II Pomeroy Equity Jurisprudence, p. 408, §§ 914, 915, 918, and cases cited under § 914.

"It does not always occur that guardians are true to their sacred trust; and from want of judgment, or for other reasons, they are often induced to take measures to dispose of the lands of their wards without necessity and at great loss. Hence, the courts are required to insist upon at least a substantial compliance with the requirements of the law."

Justice Walker in *Spellman* v. *Daure*, 79 Ill. 66, 70.

A suit in equity to set aside a guardian's sale is not barred by judgment in ejectment where the question of fraud alleged in the bill in equity is not litigated in the ejectment suit.

Thomas v. *Hite*, 5 B. Mon. 590.

But the rights and interests of infants are under the special protection of courts of equity, whose duty it is to vacate every judgment and decree by which injustice has been done them.

McCann v. *Gentry*, 8 B. Mon. 666, 671.

Where infants have been made parties to proceedings and have been deprived of a substantial right by the decree following in them courts of equity have sustained bills to impeach such decrees where it is shown that error to the prejudice of the infant has been committed.

Story's Equity Pleadings, 8th Ed., Sec. 427.
Adams' Equity, 4th Am. Ed., top page 834, side page 420.
1 Daniel's Chancery Practice, 3d Am. Ed. p. 153.
Lloyd v. *Kirwood*, 112 Ill. 330.
Long v. *Mulford*, 17 O. S. 484.
Richmond v. *Tayleur*, 1 Peere Williams, 734.
Kuchenbeiser v. *Beckert*, 41 Ill. 173.
Harris v. *Youman*, 1 Hoff. C. 18.
Lloyd v. *Malone*, 23 Ill. 43.
Wright v. *Miller*, 1 Sandf. Ch. 103.
Cunningham v. *Galatin*, 1 Hop. Ch. 54.
Reynolds v. *McCurry*, 100 Ill. 356.

Where, in addition to the allegations of material errors affecting the jurisdiction of the court and securities provided by statute are dispensed with (and which are confidently believed to have been a substitution for the appointment of the guardian *ad litem* in chancery proceedings, *i. e.*, a sale bond to secure the proper disposition of the proceeds of sales about to be made)—where the knowledge of the purchaser of these irregularities, designed to get proceeds into the hands of an irresponsible guardian, in an amount far in excess of the penalty even of the original bond, it seems to us a most persuasive equity is presented for the consideration of the court.

The orders of the Probate Court are also held reviewable by such a proceeding in equity.

Johnson v. *Waters*, 111 U. S. 640.
Gaines v. *Fuentes*, 92 U. S. 10.

And the State Courts have sustained such action brought to set aside orders of sale in Probate Court made by guardians and their deeds executed in pursuance of them: *McKeever* v. *Ball*, 71 Ind. 398; *Guynn* v. *McCaully*, 32 Ark. 97; *Musgrave* v. *Conover*, 85 Ill. 375; *Reynolds* v. *McCurry*, 100 Ill. 356.

Infants have always been favorites of a court of equity, indeed of all courts, and the fraudulent divestiture of their lands under the guise of legal proceedings has frequently been the subject of review in courts.

Williamson v. *Berry*, 8 How. 544.
Bank of U. S. v. *Ritchie*, 8 How. 140.
Bright v. *Boyd*, 1 Story C. C. 486.

II*a*. Jurisdiction in equity will not be defeated because the children of the fraudulent purchaser are parties. In the language of Lord Cottenham, "a court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but from his children and his children's children." Quoted in Pomeroy's Equity § 918.

III. *As to adequate remedy at law.*

The second cause of demurrer of the Harmenings is that

the appellant had an adequate remedy at law, to wit, an action of ejectment to recover the premises described. (Record p. 27.)

This is untenable in view of the decision of the State court in the case reported in 42 O. S. and taken into this court on writ of error.

Arrowsmith v. *Harmening*, 42 O. S. 254

While the allegations are that the proceedings under which the sale of the lands of the appellant were void for want of jurisdiction on the statements made of the non-observance of certain statutory requirements before a sale could be ordered, and the various steps in the proceeding are attacked directly for gross error amounting in fact to want of jurisdiction, yet it may be said that the proceedings are certainly erroneous, and if an adequate remedy was to be found by way of appeal or error, might it, perhaps, have been resorted to, but in accordance with the case of *Long* v. *Mulford* before cited, we may bring a bill to impeach the proceedings directly.

But where it is uncertain whether the appellant could avail himself at an action at law of the facts set up in the bill, it may be still entertained.

Drexel v. *Berney*, 122 U. S. 241.

IV. The remedy at law would not be adequate.

It is an inflexible remedy going upon the naked title of the plaintiff to be met with a deed under judicial proceedings which may be void or only voidable, as the court may decide, but which the appellant conceives to be wrongful, fraudulent, irregular and the irregularity not be shown in the collateral suit. It may be established that the defendants were guilty of invoking the action of a court of competent jurisdiction up to a certain point when it may be, by proof *dehors* the record, shown that the court had lost its jurisdiction so that as to some of the tracts, that, at least, he would be entitled to recover, as to others not. A departure from the *law*, though jurisdiction has been acquired, vitiates the judgment or order of sale.

Windsor v. *McVeigh*, 93 U. S. 274.
United States v. *Wallace*, 109 U. S. 258.

It might on hearing under the offer to do equity on the part of the appellant be shown that as to a small portion of the proceeds of the land conveyed to the ancestor Harmening that they had been applied to the benefit of the appellant, that as to other portions they had not been so applied. In such a case it would be equitable to hold the defendants as trustees for the appellant and adjustment of the rents and profits on the one side and the improvements on the other be made and complete justice be done.

Summers v. *Howard*, 33 Ark. 490.

The defendants Harmening might be held to be in the condition of trespassers on an infant's lands and be bound to answer in the court of equity for the rents received.

Grimes v. *Wilson*, 4th Blackf. 331.

An adequate remedy at law does not lie in this case because it is alleged that the defendant Gleason is insolvent and a suit at law would be wholly unavailing as against him.

We think it may be fairly inferred from the allegations of the bill that a suit on his so-called bond would also be unavailing, at least so far as the disposition of the proceeds of the real estate sold by him is concerned.

It has been held in numerous cases where the statute provides that before a sale of lands of a ward by his guardian is ordered by the court having jurisdiction in such cases that no suit can be maintained on the general bond of the guardian for the conversion of these proceeds.

Shelton v. *Smith*, 59 Tenn. (3 Baxter), 82.
Henderson v. *Cooper*, 4 Nev. 429.
Madison Co. v. *Johnston*, 51 Ia. 152.
Mattoon v. *Cowing*, 13 Gray, 387.
Lyman v. *Conkey*, 1 Met. (Mass.) 317.
Baluser v. *Diehl*, 90 Pa. St. 350.

The precise point has never been adjudicated in Ohio in the Supreme Court.

We are entitled to this relief though the proceedings are alleged to be void or of no validity. See cases cited under point III.

Pomeroy's Equity Jurisprudence, § 1377, Vol. III, p. 416.

As was said in *Sutherland* v. *Watson*, 5 Wall., every case in equity must stand on its own circumstances very largely as to whether it is of equity cognizance. In that case this court took jurisdiction to prevent a sale by the marshal of a stock of goods by injunction on the ground that though there was a remedy at law on the bond of the marshal it was inadequate.

What more inadequate than an attempt to obtain satisfaction on a bond for $5,000 where it is shown that nearly $10,000 have gone into the hands of the guardian and the liability of the surety at least quite doubtful even to the extent of the penalty?

What more inadequate than a suit in ejectment to be met with the objection that the remedy, if one exists, is by direct attack on the proceedings in question?

A petition in error would not afford the remedy, for this would leave the sale to stand without any equitable relief whatever, and would be a painful experience, probably, of the uncertainty of the law.

An appeal does not lie in such cases until, at least, the ward arrives at majority and the purchaser is not such party as can be affected either by such a proceeding or in error.

It is worthy of consideration whether the right of this appellant to show cause against this order of the Probate Court may yet be saved to him by Section 5330 of the Revised Statutes of Ohio, viz.:

"It shall not be necessary to reserve in a judgment or order the right of an infant to show cause against it after attaining his full age; but in any case in which, but for this

section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order and judgment."

Section 537 of the Revised Statutes of Ohio provide "in the exercise of the jurisdiction conferred, the Probate Judge shall have the same powers, perform the same duties and be governed by the same rules and regulations as are provided by law for the courts of Common Pleas and the judges thereof, in vacation, so far as the same are consistent with laws in force." Both of these provisions were in force when the proceedings complained of were had in the Probate Court, and that the purchaser took with full notice of this provision of law, and that this purchase was thus subject to a condition provided by law in the nature of a condition subsequent.

There can be no question, if this is to be regarded as an adversary proceeding, the ward and the widow both being parties to the proceeding, that the above provision would be applicable to such cases, because in this the Probate Court is given concurrent jurisdiction with the Court of Common Pleas.

But if it be held that an attack upon the validity of the order and proceedings of the Probate Court are not open to us, yet we have the right to relief on the ground of a fraudulent use of these proceedings to deprive the appellant of his inheritance.

Johnson v. *Waters*, 11 U. S. 640.
Graffam v. *Burgess*, 117 U. S. 181, and cases cited.

Now, as to the particular allegations in reference to each transaction.

The allegations of the bill as to the gross defects in the proceedings of the Probate, ending in the sale of six hundred and forty acres, less the right of way of the Wabash Railway, alleges the sale of the first tract at the appraised value without any *specific allegations* of fraudulent collusion on the part of the guardian and the purchaser (Record, pp. 5 and 6), but this is accompanied by a statement "that all the sales made by the said Gleason were in violation of his

trust, and that the pretended confirmations thereof, and the deeds made in pursuance thereof, were each and all of them made and done in violation of law, and were in fraud of the rights of your orator in the premises, as the said Harmening and the said Gleason well knew." (Record, pp. 7 and 8.)

The allegations that the record of the proceedings prior to the sale disclosed the fact that the entry of the order dispensing with the additional bond required by the statute before a sale of the lands of the ward could be made was contradicted by other parts of the record so that an intending purchaser could well see the falsity of the entry and the manifest violation of the law. (Record, pp. 4 and 5.)

It is submitted these statements show that the defendant Harmenings' ancestor could not be a *bona fide* purchaser and so the first sale, though no specific charges are made in reference to the fraudulent conduct of the intending purchaser, should be held void.

Johnson v. *Seers*, 114 Pa. St. 611.

As to the next sale set out in the record (pp. 6 and 7) the further statement appears that the guardian and the purchaser Harmening, were more than three years after the order of sale, and really three years and six months after the return of the appraisement on which the order was based, sold at the appraised value, though the lands had risen—"greatly advanced"—in the words of the bill, yet, without any necessity for the sale, and without any regard for the true interests of his ward, desirous to get money into his own hands, and the purchaser again knowing the fraudulen purpose of the guardian, the sale was effected and another fraud perpetrated on the ward with the assistance of the court.

These allegations are, we think, sufficient to show not only that Harmening was not a *bona fide* purchaser, but an active participant in the fraud of the guardian.

The allegations of the bill as to the third and last sale state in positive terms the *connivance* and *collusion* of the

guardian and the purchaser to obtain the largest tract, 400 acres of land. To be sure, it is shown that this tract was purchased at a considerably higher price than the other two tracts but it is averred equally well that there was no necessity whatever for this sale, that there were considerable sums of money in the hands of the guardian from the other sales as well as from release of tax titles (it appears from the exhibit (Record, pp. 17, 18) that he received $1,000, in one instance and in the other $75, for release of tax titles making with his receipts of purchase money $3,484.60).

Without any new bond, though there were in his hands more than one half of the penalty of the bond, no renewal of the order of sale, no new appraisement, though the lands had risen greatly in value, on the 4th of December, 1874, this last tract was disposed of under the guise of these proceedings, the proceeds converted to the use of the guardian and forever lost to the ward less the value of the dower interest of his mother—$1,500.

Can it be that such recklessness on the part of a Probate Court is beyond rebuke in a court of equity?

It is not possible that a state of affairs in the conduct of these *star chamber* proceedings so subversive of the very fibre and core of equity in the squandering of an inheritance of a minor can be passed unchallenged, and the order of confirmation be made to cover all the defects like a mantle of charity, and the purchaser, with guilty knowledge of the fraudulent purposes of the guardian and the falsity of the entries of the court, is to be told to go in peace? Is it to be said that the presumption that a proceeding to sell the lands of a ward is so much for his benefit that he can not dispute it; that he may be tied up without any one but his guardian to represent him, and bound hand and foot, to submit without resistance to the orders of a Probate Court because, forsooth, it has obtained jurisdiction of his person?

V. As to the 4th cause of demurrer by defendants Harmening (Record p. 27), it may be said that they have misconceived the frame of the bill. It was not framed as a bill

quia timet and so the want of allegation of possession is not objectionable.

VI. As to 5th cause of demurrer, Record p. 27.

Because an account is asked for rents and profits it does not follow but that the allegations of the bill would justify the incidental relief prayed for, though it was not brought with a view to obtain an accounting as its main object.

VII. As to want of parties.

It is stated as the 6th cause of demurrer on the part of the defendants Harmening that Mrs. Arrowsmith is a necessary party. Her interest is one entirely different from that of the appellant. It is a dower interest provided for in the statutory law of Ohio.

The relief prayed for can be given without requiring her presence in court. No allegations are made that there was any purpose to defraud her. No relief could be prayed against her.

In the language of Justice Davis in *Payne* v. *Hook*, 7 U. S. p. 432, "it can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked."

The fair allegations of the bill are that she was without the jurisdiction of the court, and a cause will not be dismissed for the reason that a person might have been made a party if the court can proceed to a decree without their presence.

Payne v. *Hook*, 7 Wall. 425, 431.
Milligan v. *Milledge*, 3 Cranch, 220.
Elmendorf v. *Taylor*, 10 Wheat. 153, 2 point.
Traders Bank v. *Campbell*, 14 Wall. 87, 94.
Story Equity Pleadings, (9th Ed.) §§ 77, 79, 81.

But want of proper parties does not affect the jurisdiction but is subject to the discretion of the court and the bil should not be dismissed for that cause alone.

Hunt v. *Wickliffe*, 2 Pet. 201, 214; *Milligan* v. *Milledge*, 3 Cranch, 220, at least without prejudice to another bill.

Kendig v. *Dean*, 97 U. S. 423.

It fairly appears that she would be barred of relief by reason of a stale equity, more than fifteen years having passed since she signed the answer consenting to take her dower interest in the proceeds of sales to be made by the guardian.

See record, p. 13.

It is respectfully submitted that on no one of the causes of demurrer, should the court below have dismissed the bill.

If the allegations affecting any one of the tracts described in the bill were sufficient, the bill should not have been dismissed.

Henry Newbegin

HENRY NEWBEGIN and

BENJ. B. KINGSBURY,

Attorneys of appellant.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 133.

DICK E. ARROWSMITH, APPELLANT,

vs.

EDWARD H. GLEASON, *et al.*, APPELLEES.

BRIEF FOR APPELLEES.

WM. C. COCHRAN, HENRY B. HARRIS,
JOHN P. CAMERON,
ATTORNEYS FOR APPELLEES.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 133.

DICK E. ARROWSMITH, *Appellant*,

vs.

EDWARD H. GLEASON, AMELIA F. HARMENING, individually and as Administratrix of John F. Harmening, deceased, and LYDIA M. HARMENING et al, by HENRY B. HARRIS, Guardian ad litem, *Appellees*.

BRIEF FOR APPELLEES.

This is an appeal from the decree of the Circuit Court for the Northern District of Ohio, sustaining demurrers, and dismissing a bill in equity, filed by the appellant against the appellees.

It appears, from the bill and the exhibits attached to and made a part thereof, that prior to November 16th, 1869, appellant owned in fee simple all the lands therein described, subject only to the dower estate of his mother, Mary E. Arrowsmith, having inherited the same from his father, John C. Arrowsmith (Record, page 2); that said lands were purchased by John F. Harmening, now deceased, at guardian's sales, made under the orders of, and confirmed by the Probate Court of Defiance

County; that deeds were made to said Harmening by order of the Court; that he paid for said lands, entered into possession and retained possession until his death in October, 1884—more than a year after appellant came to his majority; and that his widow and heirs have retained possession ever since, and are now in possession of the same.

Edward H. Gleason was the guardian, appointed by the Probate Court of Defiance County, who made the sales, acting under its orders. It is not alleged that he has, or claims, any interest in the lands so sold, or that he ever had any interest in them, and as no relief is prayed for as against him, and no decree can be entered against him in this suit, his demurrer is well taken, and he, at least, ought to be dismissed.

1 Daniell's Ch. Pl. and Pr. 295.
Story's Equity Pl. Sec. 231, 321–2.

In cases cited by appellant's counsel (page 8 of their brief), the parties declared to be necessary parties appear to have held the legal title—in one case as trustee, in the other in his own right—before the fraudulent sales, and to have been collusively interested in the property after it was sold. Gleason occupies no such position in this case.

The real controversy is between appellant, on the one hand, claiming title as the heir of John C. Arrowsmith, and the widow and heirs of John F. Harmening on the other, claiming title under John F. Harmening, who purchased and paid for the lands when sold under the orders of the Probate Court of Defiance County. The subjects matter of the controversy are the lands, so sold, and the rents and profits derived from the same during the occupancy of Harmening and his heirs. The latter are in possession. The record of the proceedings to sell the real estate is attached to and made a part of the bill of complaint.

From this, and the allegations of the bill, it seems to us plain that appellant has a *legal* title, or he has *none*, and that he has a

plain, adequate and complete remedy at law, to wit: an action to recover possession, with which, under the laws of Ohio, he can couple an action for *mesne* rents and profits, or he has none.

Sec. 5019 of the Revised Statutes of Ohio provides that "The plaintiff may unite several causes of action in the same petition, whether they are such as have heretofore been denominated as legal, or equitable, or both, when they are included in either of the following classes: * * *

6. Claims to recover real property, with or without damages for the withholding thereof, the rents and profits of the same, and the partition thereof."

See also *McKinney* vs. *McKinney*, 8 O. S. 423.

If the proceedings in the Probate Court were such as to divest the legal title of appellant, and vest it in Harmening, he has no remedy, unless the proceedings were void for want of jurisdiction, or unless the orders were obtained by fraud, to which Harmening was a party. If the sales were *void* for want of jurisdiction, or for fraud in obtaining the orders, the remedy is equally adequate at law.

Hipp vs. *Babin*, 19 How. 271.
Miles vs. *Caldwell*, 2 Wall. 35 9, 43-5.
Blanchard vs. *Brown*, 3 Wall. 245-9-250.
Grand Chute vs. *Winegar*, 15 Wall. 373.
Lewis vs. *Cocks*, 23 Wall. 466.
Ellis vs. *Davis*, 109 U. S. 485-493-4.
Killion vs. *Ebbinghaus*, 110 U. S. 568.
Fussell vs. *Gregg*, 113 U. S. 550-5.
United States vs. *Wilson*, 118 U. S. 86.
Frost vs. *Spitley*, 121 U. S. 556.
Revised Statutes of U. S., Sec. 723.

It is no answer to this to say, as counsel for appellant does (Brief, page 11), that he has tried an action at law and failed, and has carried his case all the way through the State Courts and up to this Court, with uniform lack of success. United States

Courts are not organized for the purpose of retrying issues that have been heard and decided in other Courts.

The record that is attached to the bill in this suit was before the Court in that case—the defendant had nothing else to rely on. Appellant had full opportunity in that case to show that the sales were *void*, either for want of jurisdiction, or for fraud in obtaining the order. If he did not know of the alleged fraud then, and discovered it afterwards, he had the right to reopen the case by motion (if he discovered it in time), or by petition (if later), for a new trial, on the ground of newly discovered testimony.

Revised Statutes of Ohio, Sections 5305-5307-5308 and 5309.

In the following cases, cited by appellant's counsel, in support of his present proceeding in equity, the plaintiffs brought *actions at law* to recover the possession of the real estate in controversy, or to partition the same: *Williamson* vs. *Berry*, 8 How. 541-2-3; *Windsor* vs. *McVeigh*, 93 U. S. 274-6; *Summers* vs. *Howard*, 33 Arkansas, 490; *Bright* vs. *Boyd*, 1 Story, C. C. 486; *Johns* vs. *Tiers*, 114 Pa. St. 611; *Musgrave* vs. *Conover*, 85 Ill. 375.

Instead of the plain, adequate and complete remedy which he could obtain by an action at law, appellant contents himself with asking for this partial and inadequate relief in the Circuit Court, viz.:

"Your orator therefore prays the Court to render a decree *setting aside and vacating the said order of sale of the Probate Court*, and all the proceedings thereof affecting the title of your orator to the said lands and tenements, and declaring the same, and the deeds made in pursuance thereof, to be void and of no effect; that an account be taken of the rents and profits of the said lands and tenements received by the said Harmening in his lifetime, and by the said defendants since his death, if any, and that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this honorable Court shall seem meet." (Record, page 9.)

He does not ask to be put in *possession* of the property,

though that would seem to be necessary to a complete remedy, because it would bring this suit too clearly within the purview of the cases cited by us above, and many others.

Although he alleges (Record, page 8) that such order and deeds and entries "*cloud the title*" to the said lands so that he can not effectually dispose of them, or otherwise make any beneficial use of them, he disclaims any intention to make this a bill to quiet title (Brief, pages 16, 17), for he would be met by the objection that a Court of Equity can not sustain such a bill, because the complainant by his own admission (Record, page 8) is *out of possession*.

2 Story's Equity Jurisprudence, Sec. 859.
Bispham's Principles of Equity, Sec. 575.
Orton vs. *Smith*, 18 How. 263-65.
Stark vs. *Starrs*, 6 Wal. 402-9.
United States vs. *Wilson*, 118 U. S. 86-8.
Frost vs. *Spitley*, 121 U. S. 556.
Clark vs. *Hubbard*, 8 O. R. 382-5.
Rhea vs. *Dick*, 34 O. S. 420.

Section 5779 of Ohio Revised Statutes provides, "That an action may be brought by a *person in possession*, by himself or tenant of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest." By necessary implication a person *out of possession* can not maintain such an action.

The bill does not pray that Harmening's heirs may be held as trustees, because Harmening was not a trustee, and he, at no time occupied any relations of trust and confidence toward appellant from which a trust could result, or be implied by law.

This Court will hardly entertain the notion that mere trespassers on an infant's land can be held as trustees, and so made to account in a Court of Equity, especially in view of the fact that in Ohio rents and profits may be recovered in an action at law to recover the real property.

Hipp vs. *Babin*, 19 How. 271-8-9.

But if this is not a bill to acquire possession, or to quiet title, or to have a trust declared and enforced, what is it?

Has the United States Circuit Court any power to grant the specific prayer of the bill, and to *set aside and vacate the orders of the Probate Court of Defiance County*, and *to declare the same to be void and of no effect?* We think it has not, and the Circuit Court for the Northern District of Ohio says it has not.

Story says, Sec. 1571: "Equity never attempts to act upon the Court of law itself, and does not claim any supervisory power over such courts, or the proceedings therein. It acts solely upon the party, and will enjoin him, in a proper case, from pursuing any claim in a Court of law over which the Courts of Equity have a concurrent jurisdiction and a more perfect means of doing complete justice. This it never attempts to accomplish, after judgment in a matter where the Court of law had concurrent jurisdiction, by declaring the judgment void, or setting it aside, but only by enjoining the party from proceeding to enforce it."

2 Story's Jurisprudence, p. 767.
Bispham's Principles of Equity, Sec. 47.

In *Randall* vs. *Howard*, 2 Black, 585, this Court held that it "has no jurisdiction on appeal to annul, revise or change the decree of a State Court of general jurisdiction, having complete control of the parties and of the subject matter of controversy.

"Where there is error in the proceedings of such a Court, a review can be had in the appellate tribunals of the State."

In *Nougué* vs. *Clapp*, 101 U. S. 551, this Court held that "The Circuit Court of the United States can not revise or set aside the final decree rendered by a State Court, which had complete jurisdiction of the parties and of the subject matter," and Mr. Justice Miller in deciding the case uses this language on page 554:

"We think for this Court, after all this has been done to undertake to decree that what that Court did is void, to sit on its judgments and reverse its decree and set aside its sale, in a case where jurisdiction is undoubted, is unwarranted by the relations which subsist between the two Courts. It would be an invasion

of the powers belonging to that Court, and such a doctrine would, upon the simple allegation of fraud practiced in the Court, enable a party to retry in a Federal Court any case decided against him in a State Court."

See also: *Fouvergne* vs. *New Orleans*, 18 How. 470.
Tarver vs. *Tarver*, 9 Pet. 174-80.
Adams vs. *Preston*, 22 How. 473-91.
Case of Broderick's Will, 21 Wal. 503.
Ellis vs. *Davis*, 109 U. S. 485-94.
Fussell vs. *Gregg*, 113 U. S. 550.
Amory vs. *Amory*, 3 Biss. 266-70.

The proceedings to sell real estate in the Probate Court could have been taken to the Common Pleas Court of Defiance County on appeal, and thence on error to the highest Court of the State. (Revised Statutes of Ohio, Sec. 6407.) The judgment and orders of said Probate Court in said proceedings could also have reviewed by proceedings in error, and the right to institute such proceedings, at any time within two years after he became of age, was reserved by law to the infant. (Revised Statutes, Secs. 6708-6723.) He therefore has ample remedy for correcting errors and irregularities in the proceedings, provided by the laws of Ohio which authorized the proceedings.

The cases of *Gaines* vs. *Fuentes*, 92 U. S. 10, as limited and explained in *Ellis* vs. *Davis*, 109 U. S. 485-8-9, and of *Johnson* vs. *Waters*, 111 U. S. 640, 666 9, are not in conflict with the above authorities. The latter was the case of a *creditor's bill*, to set aside as fraudulent and void certain sales of the testator's lands made by the testamentary executor to members of the family with a view to cheating the creditors. The creditors had no remedy at law, as they had no title to the lands and no right to recover them in an action of ejectment, and the fraud practiced was most aggravated.

We do not deny the right of courts of general jurisdiction to set aside *their own* judgments and decrees on bills of review, for errors apparent on the record, or original bills in the nature of bills of review for fraud in obtaining the judgments or decrees,

where such bills are part of the recognized practice of the Courts.

Most of the cases cited by counsel for appellant are of this nature, and do not at all support the theory that one Court can entertain a bill to set aside the decree of another.

See: *Taylor* vs. *Walker*, 1 Heiskell, 734.
Newcomb vs. *Dewey*, 27 Iowa, 381.
Lloyd vs. *Kirkwood*, 112 Ill. 330.
Kuchenbeiser vs. *Beckert*, 41 Ill. 173.
Lloyd vs. *Malone*, 23 Ill. 43.
Wright vs. *Miller*, 1 Sandf. Ch. 103.
Reynolds vs. *McCurry*, 100 Ill. 356.
McKeever vs. *Ball*, 71 Ind. 398.
Sheldon vs. *Tiffin*, 6 How. U. S. 163.
Long vs. *Mulford*, 17 O. S. 484.
Bank of United States vs. *Ritchie*, 8 Peters, 140.

Apparent exceptions in the cases of *Kuchenbeiser* vs. *Beckert*, 41 Ill. 173, and *McKeever* vs. *Ball*, 71 Ind. 398, are explained by the fact that the style of the Court was changed, *e. g.*, the Cook County Court of Common Pleas was changed to the Superior Court of Cook County (act of February 17, 1859); or the Court in which the bill was filed was the statutory successor of the other, *e. g.*, the Tippecanoe Circuit Court succeeded the Tippecanoe Court of Common Pleas.

In *Davis* vs. *Tileston*, 6 How. 114, and *Darst* vs. *Philips*, 41 O. S., 484, cited by appellant's counsel, injunctions were asked for and granted to prevent the parties, who had obtained judgments by fraud, from enforcing the same. In the latter case, the Court expressly distinguished it from a case to impeach a judgment for error (see page 491).

In *Spellman* vs. *Daure*, 79 Ill. 66-70, the decision of the Court confirming the sale, after exceptions taken by the ward, was set aside by direct appeal to a higher Court. In *Harris* vs. *Youmans*, 1 Hoff. Ch. 178, no decree was set aside or sought to be set aside. A question arose, before a decree was entered, as to

whether a clause should be inserted reserving to the infant a day to show cause after he became of age, and this was ordered done.

In *Richmond* vs. *Tayleur*, 1 P. Williams, 734, the Court refused to set aside a decree against an infant for alleged fraud, "though in every respect not so equitable." The reporter's note to this case states, that his Lordship's Secretary (Mr. Cottingham) said to his Lordship that Mr. Vernon used to advise the bringing of an original bill to set aside an erroneous decree, and this *note*, of what the clerk *said* a *practitioner said* he would advise his clients to do, has, strangely enough, gone into many text-books and decisions as the thing actually decided in *Richmond* vs. *Tayleur*.

Not one of the above cases supports the theory of appellant's counsel that the United States Circuit Court can set aside the decree of the State Court.

We do not deny the right of a Court of Equity to entertain a bill to hold a guardian, administrator or trustee, who buys directly or indirectly at his own sale, as trustee for the wards, heirs, or *cestuique* trust, whom he represented, and to set aside sales thus made, and direct him to reconvey and to account for rents and profits.

Taylor vs. *Walker*, 1 Heiskell, 734, and *Cunningham* vs. *Ervin*, 1 Hop. Ch., 54-5, are such cases.

Assuming, for the sake of argument, that the Circuit Court has the right to entertain a bill for setting aside the orders and sales of a Probate Court on the ground of *fraud* in obtaining such orders, are the allegations of the bill in this case, taken in connection with the record which is annexed to and forms a part of it, sufficient to bring the case within such jurisdiction? Where there is a discrepancy between the allegations of the bill as to what the record discloses and the record itself, the latter must be taken as conclusive.

1 Daniell's, Ch. Pl. and Pr., (5th Ed.), *546.

As to the allegations concerning Hardy's agreement with Gleason, and his want of knowledge and consent to the filing of

his bond without another surety (Record, pages 2-3), it is enough to say that the fraud, if there was any, was upon Hardy; that Harmening was in no way connected with it; that the validity of the bond when filed in Court was not affected thereby, and that Hardy could not escape his liability upon it.

Bigelow vs. *Comegys*, 5 O. S. 256.
Dangler vs *Baker*, 35 O. S. 673-7.
Elliott vs. *Stevens*, 10 Iowa, 418.
Bloom vs. *Burdick*, 1 Hill, 130.
Glezen vs. *Rood*, 2 Metc. 490-2.
Dair vs. *United States*, 16 Wal. 1.
Keys vs. *Williamson*, 31 O. S. 562-3.
Kneeland on Attachment, Sec. 540.
Drake on Attachment, Sec. 134*a*.

It is nowhere alleged in the bill that Hardy is insolvent, or that the money could not be made out of him.

Section 6262 Revised Statutes of Ohio provides that "No bond executed by a guardian shall be void or held invalid on account of any informality in the same, nor on account of any iuformality or illegality in the appointment of such guardian; but such bond shall have the same force and effect as if such appointment had been legally made and such bond executed in proper form." (1 S. & C., Rev. St. of Ohio, page 672, Sec. 9.)

Section 4947 Revised Statutes of Ohio provides that "In the interpretation of Part Third, * * * * words in the plural include the singular, and in the singular include the plural number."

Gleason was appointed guardian of appellant on the 15th day of July, 1869. On the 22d of July, 1869, just one week after his appointment, Gleason filed his petition as guardian, for the sale of real estate belonging to his said ward, for the payment of debts, and the maintenance and education of the ward, which petition stated among other things, that he, said Gleason was "the duly appointed and qualified guardian of Dick Evans Arrowsmith;" * * * "*That no personal estate of any kind belonging to said ward ever came to the possession or knowledge of the peti-*

tioner; that there is no personal estate of said ward dependent upon the settlement of any decedent's estate, or the execution of any trust or expectancy;" * * * describing the lands belonging to said ward, including those set forth in the Bill of Complaint, and alleging that it was *all wild land and yielded no income;* that the petitioner had *received no rents whatever from any of said ward's real estate;* that the *sale of said real estate was necessary for the maintenance and education of said ward, and that said ward was indebted to Rinaldo Evans for boarding and lodging in the sum of* $210.00, *etc.* (Record, pages 10 and 11.)

Appellant admits "*that said petition was in due form of law and duly verified; that he as well as his mother were made defendants to the said petition, and were served with notice* that the petition would be for hearing on the 10th day of August, 1869;" and that "his mother, Mary Arrowsmith, answered the said petition electing to receive her dower in the proceeds of sale to be made by the said Gleason," etc.; that, "on the said 10th day of August, the day set for the hearing of the said petition, *the said Court made an entry that it found that the statements in the said guardian's petition were true, and the lands named therein, including the lands hereinbefore described, ought to be sold,*" etc. (Record, pages 4, 11-13.)

Appraisers were duly appointed and appraised the land, in the bill described at $10.00 per acre. (Record, pages 13-15.)

On the return of the appraisement the Court confirmed the same, and made the following entry: "*And the said Edward H. Gleason having, upon his appointment as such guardian, given bond with reference to the value and sale of the real estate of the said ward, which bond is now adjudged to be sufficient for the purpose hereof, therefore the giving of additional bond is hereby dispensed with.*" (Record, page 16.) The bond itself did not appear of record, nor was there, at that time, any statute providing that it should be recorded. (2 S. & C., Rev. St. Ohio, pages 1218 and 1219.) This entry is the only reference to it contained in all the record of the proceedings for the sale of the real estate, which begins on page 10 and ends on the middle of page 20 of the printed record. This entry is called "an *illegal, false and fraudulent*

entry" in the bill; and the bill further charges "that the said illegal, false and fraudulent entry was in contradiction of other portions of the record in the said proceedings;" which last is not borne out by the record itself.

The record of the proceedings to sell real estate is entirely distinct from the record of the guardian's appointment, and a would-be purchaser, examining the former, would in no way be advised of the latter; nor was he bound to look beyond the record in the proceedings to sell real estate.

Davis vs. *Hudson*, 29 Minn. 27.
Maxsom vs. *Sawyer*, 12 O. 206.
Sheldon vs. *Newton*, 3 O. S. 494-501.

The bill does not charge that Harmening *knew* what the amount of the bond filed on the appointment of the guardian was, or whether or not it was sufficient—which was a mixed question of fact and law—but only that "*it might have been known by him* that no bond as required by law * * * had been filed," etc. (Record, page 5.)

This entry was made August 17, 1869 (Record, pages 5, 15, 16). On November 10, 1869, the Court ordered the guardian to sell the land, *or any part thereof, at private sale, but at not less than the appraised value thereof;* and on November 15th the guardian reported that he had sold 153.70 acres, to John F. Harmening, for $1,537.50, and on the 16th the sale was confirmed, and the guardian was ordered to make a deed to Harmening, which he did. (Record, pages 6-16.) The terms of the sale were one-third cash, one-third in one year, and one-third in two years, and out of the proceeds of the sale the guardian was ordered to pay $400.00 to Mary Arrowsmith, as her dower interest in the tract, leaving only $1,137.50 to be accounted for by the guardian to the ward. (Record, pages 6-16.)

There is absolutely nothing in the allegations of the bill, thus far, that points to fraud upon the part of Gleason, Harmening, or the Court, in obtaining these orders or making this sale, and, on the contrary, everything is consistent with the utmost good faith on the part of all concerned. The finding of the Court that

there was no personal estate in the hands of the guardian, and that the lands were all wild lands, from which no rent could be derived, shows that the only object in taking a $5,000 bond, on his appointment, was to cover the probable sales of real estate. The assertion of the bill (Record, page 3) that appellant had personal estate, etc., "in an amount unknown to him," can not be treated as a serious impeachment of the finding that no personal estate of any kind came to the possession or knowledge of the guardian, especially when followed, as it is, by the admission (Record, page 4), "*whether the statements therein contained as to the necessity for the sale of the real estate were true or not, he can not safely say.*"

The finding of the Court, that the bond given upon the appointment of the guardian was intended to cover the sale of real estate, and was sufficient for that purpose, was an adjudication by the Court having jurisdiction of the subject matter, and was binding until reversed; and, while the bill charges that Harmening knew the falsity of this finding, appellant's counsel admit that the precise point on which the question of sufficiency turns has not been adjudicated in the Supreme Court of Ohio. (Brief, page 13.)

While the precise point has not been adjudicated, the intimation of that Court in *Arrowsmith* vs. *Harmeniny*, 42 O. S., page 261, and their reasoning in *Tuttle* vs. *Northrop*, 44 O. S., 178-83, foreshadow what their decision will be when the precise point comes before them.

The sureties on a guardian's general bond were held liable for moneys derived from the sales of real estate in the following cases, among others, *Withers* vs. *Hickman*, 6 B. Mon. 292, *Taylor* vs. *Taylor*, *id.* 559-61, *Elbert* vs. *Jacoby*, 8 Bush, 542-7, *Commonwealth* vs. *Lloyd*, 12 Phil. 221, *Stevenson* vs. *State*, 71 Ind. 52-6, *Fee* vs. *State*, 74 Ind. 66-9, and *Lyman* vs. *Conkey*, 1 Metc. 320-1, cited by appellant's counsel, really supports the above authorities, the lands in the case at bar having been sold for the payment of debts, and not for reinvestment.

On February 15, 1873, the guardian sold another tract of 87.21 acres to Harmening at the appraised value of $10.00 per

acre, and on the 19th of February the Court confirmed this sale, and ordered the guardian to make and execute a deed to Harmening. The terms of this sale were one third cash, one-third in one, and one-third in two years, and the guardian was ordered to pay $200.00 to Mrs. Mary Arrowsmith as her dower interest in the premises. This left $672.10 to be accounted for by the guardian to the ward. Assuming that the $5,000.00 bond, filed July 15, 1869, was the only bond filed by Gleason, it was for more than double the amount received by Gleason on both these sales.

No new appraisement was made, but the statute did not require a new appraisement to be made, and the matter rested within the discretion of the Court. The bill alleges that "the value of said lands had, as he (appellant) is informed, greatly advanced;" but it does not state what they were then worth, or that the price was grossly inadequate. It charges that Gleason was willing to let Harmening have it at a low and under price for the purpose of getting money into his hands, but does not charge that Harmening knew that, or was party to any such evil intention. It now charges that "the said Harmening well knew the *falsity* of the entry of the said order of the said Court;" but as the bond, appellant refers to, was clearly sufficient in *amount*, and as the purpose of this sale, and all other questions concerning it, were questions of law passed upon by the Court in this very case, the allegations of the bill can hardly be construed as making any specific charge of fraud.

On the 4th of December, 1874, the guardian sold to Harmening 400 acres of land at $15.00 per acre, being one-half more than the appraised value of the land, and said sale was duly reported and confirmed, and a decree ordered to be made to Harmening. The terms of this sale were one-third cash, one-third in one and one third in two years, and the guardian was ordered to pay $1,500.00 to Mary Arrowsmith, as her dower interest in the property, leaving $4,500.00 in all to be accounted for by the guardian to his ward. The $5,000.00 bond was more than sufficient to cover this whole amount, and when we consider that the payments were extended over two years, it does not seem an evidence of bad faith that he was not required to give any

additional bond. From the time of Harmening's first payment in November, 1869, to his last in 1876, the payments were so distributed that Gleason would, in the ordinary course of his duties, have made disbursements and settlements long before the amount in his hands approximated anything like $5,000.00

The bill charges that there was no necessity for this last sale, and that the guardian had in his hands large sums derived from the sales before described (we know they could not have exceeded $1,600.00), as well as considerable sums (not specified), all of which was known to the said Court and the said Harmening, and that Gleason for the purpose of getting money into his hands for his own private gain, and willing that Harmening should get the lands at a low and under price (50% more than the appraised value) *connived and colluded with him*, to sell the lands, etc. It recites that they had risen in value, but does not charge that they were worth more than $15.00 per acre, or that the price paid by Harmening was grossly inadequate. It charges that the Court "*illegally confirmed* the said sale."

Finally the bill charges in general terms that "all the sales made by said Gleason were in violation of his trust, and that the *pretended confirmations* thereof, and the deeds made in pursuance thereof, were each and all of them made and done in *violation of law*, and were in *fraud of the rights* of your orator in the premises."

These charges are all against inanimate things; against the orders of the Court, the entries on its Journal; against the sales, confirmations and deeds. The bill charges that the entry was "illegal, false and fraudulent," not that anybody by misrepresentation, or concealment, or fraudulent contrivance of any kind procured it to be made; that the sales are illegal, unnecessary and void, not that any misrepresentations were made, any concealments attempted, any purchasers misled or hindered from buying, or any secret trust arranged between the guardian and the purchaser; that the confirmations were illegal and pretended, not that any one forged orders of confirmation, or procured them to be entered without the knowledge or authority of the Court, not that the Judge of the Court (who occupied that position for

over thirty years, with the entire respect of the community) corruptly and with evil intent made such orders, for the purpose of depriving said infant of his lands, and the proceeds of their sale.

When examined closely, the allegations amount to little more than a charge that said orders, sales, confirmations, etc., were irregular in some respects and, in the opinion of counsel for appellant, erroneous.

The necessity for the sales, and the sufficiency of the price were matters of fact which the Court must pass upon before confirmation, and unless there is some specific allegation of corrupt action on his part, or fraudulent misrepresentations or concealment on the part of Gleason and Harmening, by which the Court was imposed upon and induced to make unjust decisions in ignorance of what he ought to have known, his action must be held as final.

United States vs. *Throckmorton*, 98 U. S. 61, 6, 8-9.

In *Blanchard* vs. *Brown*, 3 Wall, 250, this Court says that "such questions of fraud and irregularity * * * could be disposed of as well at law as in Chancery." "A grossly inadequate price is under some circumstances evidence of fraud and a fit subject of inquiry by a jury, in determining the validity of a sale made under legal process."

"A general charge of confederacy against the defendants, though formerly customary would now, except under very special circumstances, be deemed idle and impertinent."

1 Daniell's Ch. Pl and Pr. page 275.

"In suits instituted for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. A mere general charge of fraud without alleging specific facts is not sufficient to sustain the bill. It must be shown in what the fraud consists, and how it has been effected. The fraud alleged must be set forth specifically, in particular and in detail, so that the person against whom it is charged, may have the opportunity of knowing what he has to meet, and of shaping his defense accordingly. Fraud

is a conclusion of law, and it is wholly immaterial and insufficient to allege that an instrument has been obtained by fraud, unless the things done constituting the fraud are stated on the face of the bill.

Kerr on Fraud and Mistake, page 365.

"A bill to set aside, or rather to prevent one from having the benefit of, a judgment on the ground that it was obtained by the opposite party's fraud, should be very specific in its allegations, since a judgment is a record of the highest authority; the plaintiff should accordingly, unless he can show some sufficient reason for not doing so, set up as distinctly as possible the parties to the fraud; *i. e.*, the names of all who were concerned in it and the way in which the Court was imposed upon."

Bigelow on Fraud, page 118.

"Where a bill sets forth such leading facts as do not, when analyzed, show a case of fraud or mistake, allegations or averments in the bill that there was fraud or mistake, and the expressions 'fraudulently,' 'deceitfully,' 'by mistake,' etc., interspersed throughout it, will not bring the case within equitable jurisdiction, even on a demurrer to the bill."

Magniac vs. *Thompson*, 2 Wall. Jr. 209.

In *Marquez* vs. *Frisbie*, 101 U. S. 478, this Court says: "So also as regards the allegations of fraud and imposition." * * * "The next is that, before the passage of that act, the Commissioner of the General Land Office, at the instigation of defendants, *fraudulently and unjustly ordered* that the surveys of the land should be withheld by the Surveyor General. Unless the mere use of the word *fraudulent* makes his order a *fraud*, it is impossible to see any wrong in withholding these surveys while Congress was considering," etc.

"It is also alleged that defendants will * * * thus wholly defeat the just claim and right of plaintiff, who will thus be *fraudulentiy deprived* of the land which he has settled and improved under the guarantee of the laws of the land, and which

is evidently the intent and purpose of said defendants in prosecuting their unjust and fraudulent claim to the land aforesaid."

"It is too obvious for comment that in all this the only use of the words fraud and fraudulently is to stigmatize acts which are adverse to the plaintiff's views of his own rights." * * *

"It is idle at this day to suppose that the expensive machinery of a Court of Equity is to be put in operation for the purpose of reversing and reviewing the judgments of the tribunals to whom that question is by law intrusted on such loose, untraversable allegations of fraud in general."

See also: *Ambler* vs. *Choteau*, 107 U. S. 590-591.
Amory vs. *Amory*, 3 Bissell, 266.
Pendleton vs. *Galloway*, 9 Ohio, 178-180.

If this Court should consider that it is its province to examine the proceedings of the Probate Court of Defiance County with a view to determining whether the same were erroneous or not, we submit that in such investigation they would be governed by the rules applicable to a similar proceeding on a bill of review, and would be limited in the investigations to errors of law apparent on the face of the Record.

Griggs vs. *Greer*, 3 Gil. (Ill. 2).
Whiting vs. *Bank*, 13 Pet. 6, 14.

Bearing in mind the fact that the Record of this proceeding for the sale of real estate commenced with the filing of the petition for the sale in the Probate Court by the guardian, and ending with the confirmation of the last sale and the ordering of the deed, the Record of the Proceedings to sell land is on its face free from error of law prejudical to the ward.

The Record shows the proper application by proper petition by the proper party, the due and proper service of notice, a hearing on the evidence, finding of necessary facts, proper appraisment and return, a finding by the Court that a bond had been given by the guardian, with reference to the value and sale of said real estate, and that the bond is sufficient for said sale, an order of sale, sales made and reported by the guardian to

the Court in accordance with law and the order of the Court, on the best terms obtainable, and an examination and investigation thereof by the Court, and its confirmation thereof, and its order that deeds of conveyance thereof be executed by the guardian to the purchaser. From beginning to end, so far as the record discloses, there is not the slightest informality even in the proceedings.

Mary Arrowsmith is a necessary party, because she had a dower interest in the real estate described, at the time the title was divested by the proceedings in the Probate Court, and the guardian was ordered to pay her a large part of the proceeds of the sales in lieu of her dower. If the sales should be declared invalid, the parties could only be restored to their original positions by having the widow in Court and an account taken of her dower interest and the moneys paid to her. The jurisdiction of the Probate Court to make an allowance in lieu of dower depended upon their right to order a sale of the land. If they had no such right, her dower was not extinguished.

Sec. 3, of the Probate act, provides that "Probate Courts shall have concurrent jurisdiction,

"I. In the sale of lands on petition by executors, administrators and guardians and the *assignment of dower* in such cases of sale."

1 Revised Statutes of Ohio, Sec. 525.
2 Swan and Critchfield, p. 1213.

RESUMÉ.

I.

If the sales were void, for want of jurisdiction or for fraud, appellant has a plain, adequate and complete remedy at law, to wit: an action to recover possession of the property, with which, under the Ohio Statutes, he can unite an action for rents and profits.

II.

Where the party has a plain, adequate and complete remedy at law, a United States Circuit Court will not entertain a bill in equity in the case.

III.

The United States Circuit Court for the Northern District of Ohlo has no jurisdiction in error, or by appeal, over the State Courts, and no power to set aside the orders and proceedings of the Probate Court of Defiance County.

IV.

There is no error apparent on the face of the proceedings for the sale of real estate in the Probate Court, and such error only could be reached and corrected by a bill of review.

V.

Appellant does not ask for any specific relief which it is within the power of the United States Court to grant. His bill does not state a case, or pray, for an injunction, for possession, to have his title quieted, or to have defendants held as trustees.

VI.

The charges of fraud in the bill, are not sufficient as against John F. Harmening, to warrant the Circuit Court in assuming jurisdiction in equity even if the remedy at law was doubtful.

VII.

Mary Arrowsmith, mother of the appellant, had a dower interest in the premises, which was directly affected by the proceedings in the Probate Court of Defiance County, and she is therefore a necessary party to any suit to annul or set them aside.

WM. C. COCHRAN,
HENRY B. HARRIS,

Attorneys for Defendants,
Amelia F. Harmening et al.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

No. 133.

DICK E. ARROWSMITH, APPELLANT,

against

EDWARD H. GLEASON ET AL., APPELLEES.

BRIEF OF APPELLANT IN REPLY.

HENRY NEWBEGIN,
B. B. KINGSBURY,
For Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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BRIEF OF APPELLANT IN REPLY.

1. We claim that under the averments of the bill of complaint, notwithstanding the decisions of the supreme court of Ohio in the cases of Mauarr *vs.* Parrish and of Arrowsmith *vs.* Harmening, on which the appellees' attorneys seem mostly to rely, the pretended order of sales and the sales themselves made thereunder in the proceedings of the probate court of the lands described in the bill were not only erroneous and voidable, but absolutely void.

At the time this pretended order of sale was made by the probate court or judge the following provisions of law as to making of appraisement and giving of sale bond in such proceedings were in force in Ohio: "Upon the appraisement of said real estate being filed, signed by said appraisers, the

court shall require such guardian to execute a bond to the State of Ohio in double the appraised value of such real estate, with condition for the faithful discharge of his duties and the faithful payment and accounting for of all moneys arising from such sale according to law."

1 S. & C., p. 676, sec. 27.

"Upon such bond being filed and approved by the court it shall order the sale of such real estate," &c.

Swan & Sayler, 383.

These provisions of the statute law of Ohio, in as strong language as it is possible to use, make it a condition precedent to the vesting of jurisdiction in the court to order the sale—*i. e.*, over the subject-matter of the proceedings—that the sale bond shall be *first* taken in double the amount of the appraisement *first* to be made *before the court has power to order the sale*, and the fact that this bond was waived, as recited in the proceeding, is but evidence of the collusion of the probate judge to the fraud of the parties, which in substance is charged in the bill. We do not deny that while the probate court is a court of inferior as well as limited jurisdiction under the law of Ohio, as construed by its supreme court, it is such a court of record that its jurisdiction will be presumed, though the facts which constitute it are not set out in the record; but when, as in this case, the record is not merely silent, *but it appears on the face of it* that there is an attempt to exercise a jurisdiction or power not conferred by law, this presumption ceases and all proceedings thereunder are void.

Moore *vs.* Starks, 1 Ohio St., 369.

Scott *vs.* Bracket, 89 Ind., 418 and 419.

And the same is held in effect in—

Grignon's lessee *vs.* Astor, 2 How., 339, 340.

Galpin *vs.* Page, 18 Wall., 350.

The law is well settled that when the jurisdiction of a court is put in issue by a denial this presumption may be disproved. Now, while it is apparent on the face of the record of the probate court that no bond was given at the time of the appointment of the guardian, this issue is made by an express averment in the bill of complaint that no such bond was given (printed Record, p. 5). This does away with the claim of appellees' solicitors, made in their brief, that this court will presume such a bond was given, the record of the appointment not being set out and the bond not being required to be made a part of the record. (See this question discussed in opinion of court, Thompson *vs.* Whitman, 18 Wall., 457.) So it follows, as a legal conclusion, that where the record itself of the case contradicts it such presumption cannot prevail.

With few exceptions, this Supreme Court and the supreme courts of the States generally, where there has been a non-compliance with the preliminary requirements of the law, or where the courts have exceeded the powers conferred on them by law, have held administrators', guardians', and other judicial sales not only voidable, but absolutely void.

See Boswell's Lessee *vs.* Otis, 9 How., 336.

See especially page 350 of the opinion of Justice McLean.

Pennoyer *vs.* Neff, 95 U. S., 714.

Moore *vs.* Starks, *supra.*

Campbell vs. *Knights*, 26 *Maine*, 224.

Parker *vs.* Nichols, 7 Pick., 111.
Williams vs. *Reed*, 5 *Pick.*, 480.
Blackman *vs.* Bauman, 22 Wis., 611.
Cooper *vs.* Southerland, 3 Iowa, 114.
Thornton *vs.* Mulquinne, 12 Iowa, 549.
Wiley *vs.* White, 3 Stew. & P., 355 (Ala.).
Currie *vs.* Stewart, 26 Miss., 646.
Babcock vs. *Cobb*, 11 *Minn.*, 347.
Williams *vs.* Morton, 38 Maine, 47.
Doe *vs.* Jackson, 51 Ala., 514.
Stewart vs. *Baily*, 28 *Mich.*, 251–'4.
Ryder *vs.* Flanders, 30 Mich., 336.
McKeever vs. *Ball*, 71 *Ind.*, 398.
Megowan vs. *Way*, 1 *Met.* (*Ky.*), 418.
Wells vs. *Cowherd*, 2 *Met.* (*Ky.*), 514.
Watts *vs.* Pond, 4 Met. (Ky.), 61.
Lloyd *vs.* Erwin, 29 Grattan (Va.), 598.
Rankin *vs.* Miller, 43 Iowa, 11.
Lyman *vs.* Conkey, 1 Met. (Mass.), 321.
Wilkinson vs. *Filby*, 24 *Wis.*, 441.

Nor is it even necessary to return the consideration—a question which, however, is not involved in the case at bar, no money ever having come to the possession of the appellant.

Self *vs.* Taylor, 33 La. An., 769.
Miller *vs.* Smith, 26 Minn., 248.
Walsh *vs.* Young, 110 Mass., 399.
Reynolds vs. *McCurdy*, 100 *Ill.*, 356.

2. But the appellees take shelter under the decisions of the supreme court of Ohio in the cases of Mauarr *vs.* Parrish, 26 Ohio St., 636, and of the ejectment suit of the appellant in this matter, 42 Ohio St., 254. In the latter case the court labors hard in attempting to show that the decision of Mauarr *vs.* Parrish had become a rule of property in Ohio, when, so far as it has any bearing on the requirement of the sale bond, as a condition precedent to the power of the court to make an order to sell this land, it had never been heard of in Ohio until unearthed by appellees' counsel in the latter case. Further, in that case, according to every presumption of law, as appears from the third proposition of the syllabus and the facts as stated, the law was complied with by the giving of a sale bond, though perhaps "*new bonds*" were not required *at* "*the time* of making the order, as from the case it appears, page 627, that 'the record does not show that at the time of ordering the sale the court required the guardian to give additional bonds or security, as the statute requires, but, instead thereof, that the court found the *bonds* already given to be sufficient.'"

There was but one minor in the case, Laura Parrish. The guardian at the time of his appointment was not required to give but one bond, and, as the case recites that "*bonds*" were given, it must be presumed in law that a bond was given in view of, and conditioned as required by, the law for the sale of the premises described in the case, and the most that can be said for the court in regard to its decision in the Arrowsmith case is that it mistook the import of the decision of Mauarr *vs.* Parrish.

But whether or not the decision in Mauarr *vs.* Parrish had become a rule of property in Ohio the appellees cannot claim

under it in this suit. Harmening, through the pretended sale set out in our bill, *did not get possession of this minor's lands, relying on the law of that decision*, as the decision was made some time in the year 1875, and the order of sale made by the probate court, under which he bought, was entered November 10, 1869, and his pretended purchases actually made November 15, 1869, February 15, 1873, and December 4, 1874, all prior to that decision. *Having obtained possession of our property without authority of law, no change in the law can enable the appellees to hold it.*

Strong vs. *Strauss*, 40 Ohio St., 87.

3. At the time of the decision of the ejectment suit of Arrow-*vs.* Harmening by the supreme court of Ohio the case of Mauarr *vs.* Parrish, as the supreme court construed it, was not only, as we have shown, antagonistic to the law as generally held throughout the land, but was an anomalous decision in Ohio, contrary to the drift of the other decisions of that State, and in no sense could it be said to be established law so as to be a rule of property. In the case of—

Lessee of Perry vs. *Brainard*, 11 Ohio, 442.

It was held under a statute giving the choice of guardians to femaleminors when arriving at twelve years of age, and requiring the court to appoint a guardian if this choice was not exercised after due notice, that a sale of the minor's land made by her former guardian when she was twelve years and eight months old, under regular proceedings instituted for that purpose and confirmed by the court, *was absolutely*

void, and that she could recover back the lands in ejectment after she became of age.

The case of Maxsom *vs.* Sawyer, 12 Ohio, 195, does not conflict with this, but in effect holds the law the same. There *a sale bond was given;* and the court holds that the bond (at the time of the guardian's appointment), not being required to be carried into the record, and the record being silent as to it, it will be presumed that one was given. *See especially page* 206.

Moore vs. *Starks, supra.*

The decision of Perry *vs.* Brainard was followed by the supreme court of Ohio in—

Favorite *vs.* Booher's Adm'r, 17 Ohio St., 555, and in

Dengenhart *vs.* Cracraft, 36 Ohio St., 572.

See also the analogous cases of—

Foresman *vs.* Haag, 36 Ohio St., 102, and

Wehrle *vs.* Wehrle, 39 Ohio St., 365.

We think it will appear from the foregoing that at the time of the decision of the ejectment case in 42 Ohio St. the court mistook the law in supposing that Mauarr *vs.* Parrish had become a rule of property in Ohio, *but that the contrarg was the law.* For the purposes of this case, then, this Supreme Court will for itself decide how the law should be held in order to do justice between the parties.

Carroll *vs.* Carroll, 16 How., 275, *286.*

Pease *vs.* Peck, 18 How., 595, *599.*

4. But had the law of Mauarr *vs.* Parrish become settled,

so as to have been a rule of title to property in Ohio at the time of the decision of the ejectment case of Arrowsmith *vs.* Harmening, it in no manner estops the appellant from bringing this suit.

Hart *vs.* Sansom, 110 U. S., 151, and see—
Fenn *vs.* Holme, 21 How., 481.

The case of Mauarr *vs.* Parrish was not only bad in itself, but it had not become the settled law of Ohio, even if there had been no other decisions in conflict with it.

For the doctrine of "*stare decisis*" to apply, there must have been such an acquiescence and for such a time as it would have become embodied into the law of the State, so as in truth to be a rule of property; whereas the ejectment suit of Arrowsmith *vs.* Harmening was the very next coming before the court wherein the other case could be questioned.

Lane *vs.* Vick, 3 How., 464.
Carroll *vs.* Carroll, 16 How., 286.

This case of Mauarr *vs.* Parrish was an innovation on the law of Ohio, and, so far as it could be claimed to be an authority in favor of the appellees, it should have been overruled by the Supreme Court. "For if it be found that the former decision is manifestly absurd or unjust it is declared not that such a sentence was bad law but that it was not law, as has been erroneously determined." Broom's Maxims, Morg., p. 153, 6th Am. ed. This doctrine of "*stare decisis*" is held very differently from Arrowsmith *vs.* Hermening, in *Kearney* vs. *Ruttles*, 1 Ohio St., 362, which con-

fines the rule to property "*which becomes valuable and changes hands upon the faith of such decisions.*"

The supreme court of Ohio, in the ejectment case of Arrowsmith *vs.* Hermening, remits us to some proceeding in error to reverse this order of sale of the probate court. We felt that we had a right according to every principle of law and justice to a recovery in that suit, and concurrently with this appeal we took error from that decision to this Court. On motion of the defendant to dismiss the writ of error that case was affirmed without argument by this Supreme Court, on the ground that where a State enacts laws for the protection of the property of its citizens this Supreme Court will not interfere on error with the construction placed on such laws by the State courts.

Arrowsmith *vs.* Harmening, 118 U. S., 194.

The Chief Justice was, however, mistaken in his statement of the case (p. 195) that a claim of Federal right was first set up in the supreme court of the State for the first time in that case. One ground assigned in the motion for a new trial in the court of common pleas was that the judgment was "*contrary to the law of the land,*" and the same was assigned as error in the petition of error in the district court, while it is true equivalent language, "without due process of law," appeared in the petition in error in the supreme court of the State for the first time. We did not move for a rehearing of the case, for the reason that we believed then and still be-

lieve that we can have our rights fully determined in this appeal now at hearing.

In remitting us to some proceeding in error the supreme court of the State does not point out to us any remedy nor prescribe what course we should pursue, if indeed they knew of any course provided by law. The appellees' counsel in their brief kindly say that the minor could have appealed from the order of sale of the probate court to the court of common pleas of the county; possibly, if this infant, then six years old, had been precocious enough to have understood his rights, and either been able to have gone into court personally or retained counsel for that purpose. This he must have been able to do, for his guardian was antagonistic to him, and no guardian *ad litem* was either required by law to be or was in fact appointed.

We know of no provision in the law of Ohio for a review on error of proceedings of a guardian to sell his ward's lands, *by the minor*, either before or after he becomes of age. As the guardian represents the minor it would be practically taking error from a decision in favor of himself; hence the sale bond is required for the ward's protection as a condition precedent to the order of sale and before the court can acquire jurisdiction of the subject-matter of the suit.

But we are not left to our own construction of the law on this question. Before the ejectment suit was brought in the court of common pleas of Defiance county suit was instituted by the successor of Gleason to the guardianship of the property of the minor, Rinaldo Evans, against Hardy and Gleason to recover on the guardian's bond the proceeds of this real estate. The case was submitted to the judge without a jury, and it was held that no recovery could be had against

the surety, Hardy, on that bond for these proceeds; in other words, that the surety on the bond given at the time of his appointment by Gleason *could not be holden for these proceeds.* Within two years after coming of age Arrowsmith took error to the district court to reverse that judgment, which petition was dismissed by the circuit court of that county (the successor to the district court) on the ground that a minor after coming of age could not take error to reverse such a proceeding, unless error was actually taken within the two years allowed for proceedings in error generally.

1 Ohio C. C. Rep., 345.

This was a proceeding to reverse a judgment against his guardian and not in his favor. It is the last and, indeed, only decision of Ohio directly on this subject, to our knowledge, and is the settled law of that circuit; but our Supreme Court *queries* whether the law is not the same.

Favorite *vs.* Booher's Adm'r, 17 Ohio St., 548.

The supreme court of the State in deciding the ejectment suit refuse to express any opinion on this question; but even if a proceeding in error lay it would be entirely inadequate to restore the complainant his lost property. The appellees could not be made parties to it, nor would a reversal divest them of their wrongfully acquired title. We could only look to the proceeds of the sale, which we tried to secure as above, when we were turned out of court. The appellees' counsel say we should sue in ejectment. With their ill-gotten gain they now laugh at us, under shelter of the supreme court of Ohio, and when we ask bread of your Honors they would give us a stone.

Very soon after the decision of the common pleas court to the effect that we had no remedy on the guardian's bond we instituted the suit in ejectment in the same common pleas court. This was submitted to the court without the intervention of a jury, and the *same judge* now decided that ejectment did not lie. He was a member of the district court of Defiance county when the case came before it on error and was affirmed, and likewise had become a member of the supreme court of the State, when the same case—Arrowsmith *vs.* Harmoning—was heard, and he took part in the decision. We state these facts merely. So the State supreme court knew, in expressing no opinion whether an action lay on the guardian's bond, that a suit had been brought to recover on that bond, and that we had been turned out of court.

Of course, the decision of the supreme court of Ohio in the ejectment suit is a bar to any other action in ejectment in any court. In remitting us to a proceeding in error, if any existed, the court in substance decides that the proceedings of the probate court under which the complainant's lands were sold were erroneous and voidable. We cannot for a moment presume that the court (like counsel on the other side) were trifling with us. We have attempted to show this court that we have no remedy—at best, no effective remedy—by a proceeding in error. The counsel for the appellees, in their authorities claiming that the United States circuit courts have no appellate jurisdiction to review the decisions of the State courts, have mistaken the import of our bill. It is not a proceeding in error nor a bill of review for that purpose, but an original bill in equity (in the nature of a bill of review, if your honors so please to call it) to vacate,

annul, and hold for naught, utterly wipe out of existence, those pretended proceedings of sale in the probate court. If a bill in equity for that purpose would lie in a court of original jurisdiction of the State, it lies in the United States circuit court under the averments of citizenship of the parties made in the bill.

Now, if the order of sale were void for want of jurisdiction or for any other alleged cause, then the bill lies to clear away the matter from the record, or if voidable under the allegations of the bill then it can be vacated. My associate in his opening brief has cited authorities in support of this doctrine. It must be borne in mind that we are attacking the order of the probate court for want of jurisdiction, and that the case of Neugué *vs.* Clapp, 101 U. S., cited by defendant's counsel, does not apply. It is absurd for counsel on the other side to tell the court that the lower court has decided this question in their favor, unless they question the appellate jurisdiction of this Supreme Court to review that decision, for that is just the question we have brought here to have decided. If there are too many or too few parties in the suit that is a matter of amendment. I do not think this Court will turn us away empty just on this account If, as appellees' counsel intimate, their clients hold the appellant's property in trust for him, under our prayer for general relief this court will declare him a trustee and require them to give an account of their stewardship. It has been said by an eminent judge of Ohio that the prayer for general relief in equity, is the best ever made, excepting only the Lord's Prayer, and that under it anything within the jurisdiction of the court would be granted. It remains for this Supreme Court, the last to which we can resort, to say

whether this appellant, who has been active and vigilant since he became of age to pursue the remedies his counsel advised him he had for the purpose of recovering his inheritance, of which, as we aver, he was fraudulently stripped when but six years of age by those who should have been his protectors, and under color of fraudulent judicial proceedings, shall go hence without remedy or his inheritance be restored to him.

HENRY NEWBEGIN,
Of Counsel for Appellant.